2004

Bingham Consolidation Company, a Delaware corporation v. Robert Groesbeck, and individual; Marilyn Groesbeck Glade, an individual; and Robert Groesbeck and R. Clay Groesbeck as Trustees of the Robert R. Groesbeck Living Trust, a Utah Trust : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BINGHAM CONSOLIDATION COMPANY, a Delaware corporation, Plaintiff/Appellant, vs. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK AND R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust, Defendants/Appellees.	Appeal No. 20040141-CA District Court Case No. 980904874

BRIEF OF THE APPELLANT

Appeal from the Third Judicial District Court, Salt Lake County,
Judge Stephen Henriod

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LIST OF ALL PARTIES

All parties to the litigation are listed in the caption.

JURISDICTION

Jurisdiction is premised upon Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES WITH STANDARD OF APPELLATE REVIEW

ISSUE NO. 1: DID THE COURT ERR BY FAILING TO BASE ITS VALUATION OF STOCK SHARES ON THE INVESTMENT VALUE OF THE COMPANY?

Question of law and statutory interpretation reviewed for correctness. See Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999); Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992).

This issue was preserved in the trial court in that appellant argued to the trial court that the valuation should be based on the investment value of the company and not based upon alleged breach of fiduciary duty unrelated to the merger, and moved to exclude such evidence. R. 1194 at pp. 367, 381; Plaintiff's Motion to Dismiss Defendant's Counterclaim (R. 188-190), Plaintiff's Motion in Limine to Exclude Evidence of Breach of Fiduciary Duty Unrelated to the Merger (R. 1110-1112), Plaintiff's Motion for Partial Summary Judgment (R. 615-617).

Determinative Law: Utah Code Ann. § 16-10a-1330; Oakridge Energy Inc. v. Clifton, 937 P.2d 130 (Utah 1997); Hogle v. Zinetics Medical, Inc., 63 P. 3d 80 (Utah 2002).

ISSUE NO. 2: DID THE COURT IMPROPERLY RELY ON EXTRINSIC EVIDENCE TO INTERPRET THE LEASE AND TO DISREGARD KENNECOTT'S RIGHTS UNDER THE MINING LEASE?

Common law interpretation reviewed for correctness. Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992).

This issue was preserved in the trial court in that appellant argued to the trial court that the unambiguous terms of the integrated lease allowed Kennecott to mine the surface of the New Bingham claims, and moved to exclude extrinsic evidence. R. 1194 at pp. 376-379; Plaintiff's Motion in Limine to Exclude the Introduction of Extrinsic Evidence to Interpret the 1979 Lease (R. 1040-1042).

Determinative Law: Plateau Mining Company v. Utah Div. of State Lands and Forestry, 802 P.2d 720 (Utah 1990); Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983).

ISSUE NO. 3 DID THE COURT ERR IN CONCLUDING THAT AN ARM'S LENGTH NEGOTIATION WOULD HAVE RESULTED IN COMPENSATION TO NEW BINGHAM IN THE AMOUNT OF $36 MILLION DOLLARS, AN AMOUNT FAR ABOVE WHAT KENNECOTT HAD PAID AND ANACONDA HAD ACCEPTED FOR THIS PARCEL AND 12,000 ADDITIONAL ACRES TWO YEARS EARLIER?

Mixed question of law and fact, factual questions being reviewed under a clearly erroneous standard and legal questions under the correctness standard. See Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998), cert. denied, 119 S.Ct. 1803 (1999).

This issue was preserved in the trial court in that appellant argued to the trial court that the evidence will not support speculation that such a negotiation would have resulted

in such an enormous payment. R. 1194 at p. 379-380; Plaintiff's Motion for Partial Summary Judgment (R. 615-617).

Determinative law: Bastian v. King, 661 P.2d 953 (Utah 1983).

ISSUE NO. 4: DID THE COURT ERR IN CONCLUDING THAT MINORITY SHAREHOLDERS DID NOT HAVE NOTICE OF THEIR LEGAL CLAIMS AND THAT THEIR CLAIMS WERE THEREFORE NOT BARRED?

Mixed question of law and fact, factual questions being reviewed under clearly erroneous standard and legal questions under the correctness standard. See Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998), cert. denied, 119 S.Ct. 1803 (1999).

This issue was preserved in the trial court in that appellant argued to the trial court that appellees were advised by their own legal counsel and had notice of their legal claims and failed to raise them. R. 1194 at pp. 368-374; Plaintiff's Motion for Partial Summary Judgment (R. 615-617).

Determinative Law: Utah Code Ann. § 78-12-27; Sharon Steel Corp. v. Aetna Cas. and Sur. Co., 931 P.2d 127 (Utah 1997); Papanikolas Bros. Ent. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256 (Utah 1975).

STATEMENT OF THE CASE

This is a case filed pursuant to Utah Code Ann. § 16-10a-1330(1) to determine the "fair value" of the stock of a company which was merged into another. The appellees ("Groesbecks") owned 3.8% of the company and were paid approximately $40,000 for their shares in the merger based on a total value for the company of approximately $1 million. The Groesbecks dissented from the merger, which led to this statutory valuation

proceeding. The matter was tried to the bench resulting in a judgment for Groesbecks for compensation above that which they had previously been paid in the amount of over $1.325 million (based on a total company value of $36 million), to which interest was added for a total judgment of over $2 million.

STATEMENT OF THE FACTS

New Bingham Mary Mining Company ("New Bingham") was incorporated in 1929. A predecessor to the Groesbecks was one of the original shareholders. Finding of Fact no. 2, R. 1141. The company's sole assets were two adjacent mining claims purchased at that time for $10,000, occupying approximately 16 acres in the Oquirrh Mountains of Utah. Ex. 1 at Article XVII. From the time the company was incorporated until 1979 there is no evidence that the company had any operations or income. R. 1193, pp. 239-240.

Over time a majority interest in New Bingham was acquired by The Anaconda Company ("Anaconda"). Anaconda itself owned thousands of acres in the Oquirrh Mountains surrounding the New Bingham claims and adjacent to the western edge of the Kennecott Corporation mining properties. See Ex. 26 (aerial photo in addendum to this brief). In the late 1970's Anaconda proposed to develop an underground copper mine in the vicinity of the New Bingham claims called the Carr Fork Mine, and in 1979 Anaconda and New Bingham entered into a mining lease by which New Bingham granted Anaconda the right to conduct mining operations on the New Bingham claims. Ex. 2, 3 (in addendum to this brief). In return New Bingham would receive an immediate cash payment of $5,000, minimum advance royalty payments of $25,000 per year, plus a

production royalty of 3% of net returns on all minerals removed from the property. At the meeting of the shareholders of New Bingham held to vote on the mining lease, the Groesbecks appeared with their lawyer and argued against approval of the lease for a number of reasons including that they did not believe the royalty amount was sufficient. Notwithstanding the Groesbecks' protests the lease was approved by a majority vote of the shareholders, including minority shareholders. Ex. 2.

Anaconda operated its mine for approximately two years from fall of 1979 to fall of 1981 before shutting it down, never to reopen, because it was uneconomical. Ex. 8; R.1192, pp. 91-93.

The Groesbecks and their attorneys were vigilant about monitoring the activities of Anaconda and New Bingham. On April 9, 1982, for example, Groesbecks through their counsel complained to Anaconda that New Bingham shareholders were not receiving appropriate accountings. They alleged that "minority shareholders have substantial rights which have been disregarded," and that the Groesbecks had researched records at the State of Utah, Department of Natural Resources, Division of Oil, Gas & Mining, to determine that Anaconda had been mining ore from the New Bingham properties. Ex. 5.

Groesbecks attended a New Bingham shareholder meeting on April 14, 1982 at which, according to the minutes, "[a] discussion was held regarding the future of the Company" and the future of Anaconda's Carr Fork Mine. Ex. 6.

In approximately May, 1982 New Bingham paid a dividend to shareholders including the Groesbecks. In correspondence explaining the dividend, shareholders were

advised of the mining that had taken place pursuant to the lease and of the royalty calculation that led to the dividend. Ex. 8.

After the Carr Fork Mine was closed down in November of 1981 (Ex. 8) the New Bingham property returned to dormancy. The company had no means to mine its own claims, and indeed the claims were surrounded by the properties owned by Anaconda and Kennecott Corporation ("Kennecott") properties. New Bingham was dependent on an adjoining large mining operation to mine the New Bingham claims. R. 1192, pp. 122-123.

The Anaconda and Kennecott properties adjoined one another. The two companies for years had explored ways in which they might collaborate. Both were familiar with one another's operations. R. 1192, p. 90. Anaconda owned the property west of Kennecott's Bingham Canyon open pit mine, but Kennecott owned the mineral rights. In order for Kennecott to access its minerals it would have to expand its mine onto the surface owned by Anaconda. R. 1192, p. 87. Kennecott had studied the value to Kennecott of having access to Anaconda's property and determined that under certain assumptions, such access could potentially result in hundreds of millions of dollars, or even billions of dollars in revenue to Kennecott. Ex. 101, 102; R.1193, pp. 160-170. Despite the potential benefit to Kennecott, Kennecott and Anaconda never struck a deal for any sort of a collaborative effort, and Kennecott never even considered offering Anaconda the kind of values reflected in Kennecott's studies. R. 1192, p. 104.

In 1985 Anaconda sold all of its assets in the Oquirrh Mountains to Kennecott for $5 million. The sale included over 12,000 acres of real property, hundreds of patented

and unpatented mining claims, water rights, mining equipment and a majority interest in the shares of two companies, one of which was New Bingham. Ex. 9. Had the full $5 million been allocated only to the 86% of New Bingham purchased from Anaconda, it would imply a total company value of about $5.8 million or about 1/6 of the $36 million value placed on New Bingham by the court below. (This would mean that the other 12,000 acres, including a large area of the current Kennecott pit were being sold for free!). The Anaconda sale was an arm's length transaction by two rational economic actors, both sophisticated mining companies. Anaconda was owned by the Atlantic Richfield Company. R. 1192, p. 107. Although Anaconda was getting out of the mining business and selling its mining properties, it was not under any duress and there is no reason to believe it sold the assets for anything less than what Anaconda believed it could obtain for them. R. 1192, pp. 108-109.

The first thing the new management of New Bingham did after the asset purchase was to pay to shareholders, including Groesbecks, a dividend that had been declared prior to the sale. R. 1124; 1192, p. 110.

New Bingham held its first shareholder meeting following the asset purchase by Kennecott on August 28, 1986. At the time there were approximately 65 minority shareholders. R. 1192, p. 111. The New Bingham management was made up of Kennecott employees. None of the employees who were officers or directors was employed by Kennecott by the time of trial, other than an assistant secretary. R. 1192, pp. 109-110. The Groesbecks attended the 1986 meeting with their counsel. Although two witnesses who attended the meeting testified about it at trial, the record of what

transpired at the meeting consisted largely of the minutes of the meeting (Ex. 11) and some handwritten notes of one of the attendees at the meeting who was not available at trial. Ex. 12.

One issue discussed at the meeting was a change in one of the Articles of Incorporation, Article VII. It was presented and voted on by the shareholders, all of whom voted in favor except the Groesbecks, who spoke against it through their attorney, and voted against it. R. 1192, p. 113; Ex. 11, Ex. 12.

After the meeting an informal question and answer period took place. Among the matters discussed was whether Kennecott had all of Anaconda's records, and "gaps" in the information due to the lack of Anaconda people to talk to. Ex. 12. The group passed around and discussed a handwritten draft of a financial statement for the company, and the income and assets reflected. Id. The notes also reflect Clay Groesbeck, the son of appellee Robert Groesbeck, asking, "what would be the involvement of the two claims with 1. open pit, 2. U.G. [underground]." The notes show New Bingham management responding as follows:

> 1. U.G. – removal of ore in the past from these claims as far as I know.
>
> 2. Will mine across the claims for waste removal and construction of the roads.

Ex. 12 (Emphasis added.) The notes also reflect an unidentified individual asking, "[f]uture would the ore be mined by open pit?," and receiving the response "[p]robably not in near future [illegible] at depth-high cost." Id. The meeting was cordial and

friendly. R. 1192, p.127. Neither the Groesbecks nor any other shareholder expressed any objection to Kennecott's plan to mine across the claims. Id., p. 126.

The day after the shareholder meeting the Groesbecks, through counsel, wrote to Kennecott to say they had enjoyed the meeting with the Kennecott representative and discussing the company with him. Groesbecks also requested the opportunity to examine the books and records of the company. Ex. 13; R. 1193, pp. 130-131. There followed a series of letters and meetings in which the Groesbecks and their counsel were provided with records of the company and met personally with representatives of Kennecott and New Bingham. R. 1193, pp. 131-135. Among the information requested and provided was a copy of the 1979 lease and a location map. Ex. 17; R. 1193, p.133. Additionally, in response to their request "to see the present mining situation and how it relates to the New Bingham Mary Mining property" (Ex. 14), Groesbecks were given the name and telephone number of the Kennecott mine manager so they could personally inspect the New Bingham property. The Groesbecks knew the mine manager because they had met him at the 1986 shareholder meeting. R. 1193, p. 132. Despite the opportunity to do so the Groesbecks never at that time, or at any subsequent time, visited the property. R. 1193, pp. 255-256. Neither did they ever even go to the Kennecott visitors center, which is open to the public, and which affords a view of the entire pit including the area of the New Bingham property. Id.; pp. 256, 224. During none of these meetings, or at any other time, did the Groesbecks or their counsel object to Kennecott's plans, ever suggest that New Bingham was entitled to additional compensation beyond that called for by the

lease, or ever express any interest in participating in the management of New Bingham. R. 1193, p. 136.

Consistent with the advice given in the 1986 shareholder meeting, Kennecott, in 1989, began mining across the surface of the New Bingham claims and other and larger ground acquired from Anaconda for the removal of waste. R. 1193, p. 135; Ex. 26. The process of removing the waste or overburden in a surface mining operation is sometimes referred to as "stripping." R. 1192, p. 82. In order to mine on the surface you have to strip the surface. R. 1194, p. 344. The distinction between overburden and ore is an economic one. Id., p. 81. When material excavated contains sufficient quantities and concentrations of minerals that it is economical to process it, the material is classified as ore. If the material is not economical it is referred to as overburden and it is sent to the waste dump. Id., p. 82.

In October of 1992 another shareholder meeting was held at which Kennecott's mine plans were discussed in some detail. The Groesbecks attended. The only written record of the meeting is the meeting minutes. Ex. 22. The minutes reflect that "Robert Groesbeck, a stockholder, asked what had happened to the property." In response, "Mr. Orchow indicated that in the current Kennecott Utah Copper Corporation mine plan there is 4.7 million tons of possible ore over the next twenty year period. There are 2 million tons contemplated for the year 2002." Id. The shareholders were also reminded that Kennecott was paying New Bingham $25,000 per year in advance royalties. Id. One of the shareholders asked if there was a current mining plan available to look at. In response, "Mr. Orchow said there was not. In the 1995-1996 period Kennecott Utah

Copper Corporation is looking at 135 [thousand] tons of ore mined from this property, with the year 2002 being the big year with 2 million tons of ore." Id. Another shareholder asked where the property is located and was told "it is in the Oquirrh Mountains above and around the open pit." Another shareholder asked if a topical map was available and was advised that "one was available and would be sent to all stockholders requesting it." Id. There was no objection to Kennecott's plans from the Groesbecks, or any suggestion that Kennecott did not have the right to mine the claims. R. 1193, pp. 140-141.

Kennecott encountered ore on the New Bingham claims in 1995, and again in 1996. R. at 1192 p. 24; Ex. 23. Additional ore was scheduled to be removed from the claims in each of the years 2000 through 2004, and 2006 through 2008. Ex. 23.

In 1997 the determination was made to merge New Bingham into plaintiff Bingham Consolidation Company, a wholly owned subsidiary of Kennecott. An appraisal was commissioned to determine the value of the stock. The appraiser first looked at market value based on stock sales. Over the years Kennecott had acquired shares of New Bingham stock at $.50 per share but the appraiser determined that the market sales data was not helpful. R. 1192, pp. 18-19. He then focused on valuing the underlying asset of the company, which was its real estate. Id. He examined some comparable sales of real estate, including the 1985 Anaconda sale reflecting a price per acre of $500, but ultimately determined that the best way to approach valuation would be the income approach, that is, to value the income stream under the mining lease using a discounted cash flow analysis. R. 1192, p. 22; Ex. 23. The appraiser, using projections

from Kennecott's mining group, as is customary in his profession, determined the ore that would be mined from the New Bingham claims over the life of the Bingham Canyon mine. R. 1192, pp. 24-25. He then calculated the annual advance and production royalties that would be paid based on those mining projections and reduced the resulting stream of revenues to present value. Ex. 23. To that figure he added the cash held by New Bingham and concluded that the company had a value of $1,072,000, or $1.10 per share. Pursuant to the appraisal, the Groesbecks were entitled to the payment of a total of $40,480. Ex. 23. The merger was approved by a vote of all minority shareholders, who also accepted the appraisal of $1.10 per share, with the exception of the Groesbecks. The Groesbecks objected to the value and pursuant to Utah statutory law, Bingham Consolidation Company filed the instant litigation to obtain a judicial determination of the value of the company.

At trial the expert retained by the Groesbecks rendered the opinion that the company was worth $36,039,6745, or $37.11 per share. The opinion was based upon a two part analysis. Groesbecks' expert first determined the investment value of the company using the same methodology as employed by the original appraiser. R. 1194, p. 349; Ex. 126. Groesbecks' expert agreed that the investment approach was the appropriate way to evaluate New Bingham. R. 1194, pp. 348-349. The investment value of the company as determined by Groesbecks' expert was $3.50 per share, the difference from appellant's appraisal being attributable to different copper prices and discount rate, and the addition of the potential for some underground reserves. Ex. 126. In a second part to his analysis, Groesbecks' expert calculated the value of the ore available to

Kennecott on Kennecott's own claims made accessible by the incorporation of the New Bingham claims into the Bingham Canyon pit. R. 1194, p. 343. The expert then opined that a fair value for Kennecott to pay for that access, or alternatively, a fair royalty to New Bingham for that access, would be an additional $33.61 per share above and beyond the investment value. Groesbeck's expert specifically refrained, however, from rendering the opinion that Kennecott would have agreed to pay that amount if a negotiation had occurred between these two parties. R. 1194, pp. 343-344. The expert also specifically did not consider the Anaconda sale to Kennecott in his opinion (Id., p.348), in which this very same property, plus many, many more acres also destined to be incorporated into Kennecott's mine, were sold for a fraction of the value he was assigning to the property.

SUMMARY OF ARGUMENTS

1. By law the shares of New Bingham should have been evaluated based upon the company's investment value at the time of the merger, that is, a discounted cash flow analysis of the company's revenues under the mining lease. The court erred by awarding, in addition to the investment value, an amount of money an order of magnitude larger representing a percentage of the benefit to Kennecott by having access to the New Bingham claims. The court did so on the theory that, had New Bingham's management not breached fiduciary duties owed to the minority shareholders, the company would have recovered that amount of money many years ago.

2. Kennecott had the right to mine the surface of the New Bingham claims, a conclusion with which the court agreed. The court erred by concluding that the lease did not allow Kennecott to mine the surface of the New Bingham claims for the primary

purpose of benefiting Kennecott's own mining operations. The lease makes no such distinction, and no mining company would have agreed to mine the New Bingham claims unless it was a benefit to the larger operation. The court arrived at its interpretation by erroneously considering evidence extraneous to the integrated, unambiguous lease.

3. In order to arrive at its evaluation, the court speculated that impartial managers of New Bingham would have elected to terminate the lease due to Kennecott's inadvertent failure to obtain written consent prior to assignment of the lease, that Kennecott would thereafter have agreed to negotiate a new lease with New Bingham and that, in that negotiation, Kennecott would have agreed to pay New Bingham $36 million for a new lease. The court's conclusion is speculative and contrary to the evidence.

4. The court erred by concluding that the Groesbecks did not have notice of the claims they now assert. In fact, there is overwhelming evidence that for 15 years prior to the time they ever asserted their claims the Groesbecks and their counsel had sufficient information to at the very least put them on inquiry notice of the claims they now assert.

ARGUMENT

The award in this case of $1.325 million for Groesbecks' 3.8% minority interest assigns a value to New Bingham as a whole of over $36 million dollars. The contrast between this value and its value as suggested by the 1985 transaction between Kennecott and Anaconda, two sophisticated mining companies acting rationally and in their own best economic interests in an arms-length transaction, is shocking. In 1985 Kennecott paid $5 million dollars not only for 86% of New Bingham, but also for many acres of

additional real estate (many times the size of the New Bingham acreage) destined, like the New Bingham claims, to be incorporated into the Bingham Canyon mine, plus a majority interest in another similar company, plus thousands of acres surrounding the mine, mining equipment, mining claims, water rights, etc. Indeed, evaluations based solely on the income stream and assets of New Bingham made by the experts in this litigation yielded a value of $1 million for the whole company using appellant's assumptions (just $40,000 for Groesbecks' 3.8%), and $3.4 million using Groesbecks' assumptions ($129,000 for 3.8%). The reason the award in this case escalated so dramatically over the value produced by conventional valuation methods and real world comparison with the Anaconda sale is that the trial court improperly reviewed the past management of the company and effectively awarded damages for alleged past breach of fiduciary duty, ignored Kennecott's rights under the mining lease, and failed to apply to the Groesbecks the statutory and common law defenses which preclude stale claims.

I. RATHER THAN BASING ITS DETERMINATION ON THE INVESTMENT VALUE OF THE COMPANY, THE COURT AWARDED DAMAGES FOR BREACH OF FIDUCIARY DUTY ALLEGEDLY COMMITTED YEARS EARLIER.

Utah law contemplates that a shareholder will be paid what his shares are worth, that is, what a rational person would pay for them at the time of the merger. That did not happen in this case. Rather the trial court reviewed the management of New Bingham over the 15 years or so prior to the merger and effectively awarded what it thought damages should have been had the Groesbecks brought a lawsuit for breach of fiduciary duty years earlier.

Utah Code Ann. § 16-10a-1330(1) provides that if a shareholder demands payment beyond the value determined by the corporation for his shares, litigation will be instituted "to determine the fair value of the shares ...." "Fair value," in turn, is defined as "the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action." Utah Code Ann. § 16-10a-1301(4).

The Utah Supreme Court has instructed that the three most recognized and relevant elements of fair value for valuation of stock under Utah Code Ann. § 16-10a-1330 are (1) investment value (discounted cash flow), (2) market value or (3) asset value. Oakridge Energy, Inc. v. Clifton 937 P.2d 130,132 (Utah 1997); Hogle v. Zinetics Medical, Inc., 63 P.3d 80 (Utah 2002). Of those methods courts have traditionally favored investment value. Oakridge 937 P.2d at 33; Hogle 63, P.3d at 88. Appellant's appraiser appropriately considered market value and asset value approaches, before settling on an investment value approach. It is the investment value methodology which appellant used to arrive at its value of $1.10 per share, and that the Groesbecks' expert used to arrive at his value of $3.50 per share. Although Groesbecks' value differs from the value determined by appellant because of differing assumptions, the two are based on the same permissible methodology and are calculated to fairly replace the value the shareholders lost on the day of the merger.

The trial court, however, went beyond any methodology approved by the Utah Supreme Court designed to replace the value to the shareholders, and instead awarded what can only be described as a windfall to Groesbecks.

First, the trial court based its determination not on the value of New Bingham but on the presumed value of the benefit to appellant's parent, Kennecott, in widening its pit onto the New Bingham claims and surrounding property, and mining its own ore on its own land. In doing so the court, among other things, violated the holdings of Oakridge Energy and Hogle in which the Utah Supreme Court expressly stated that the fair value of minority shares is not determined by the benefit enjoyed by the surviving corporation:

> Courts have made it clear, however, that "'"fair value" is not measured by any unique benefits that will accrue to the acquiring corporation, any more than the compensable value of property taken by eminent domain is measured by its special value to the condemner.'" (citing Oakridge Energy).

Hogle v. Zinetics Medical, Inc., 63 P.3d 80, 85 (Utah 2002). The Court continued:

> [t]he appraisal proceeding is not at all concerned with the losses to the *particular* dissenting shareholders or with the benefits derived by the *particular* acquiring corporation in the merger, except as these losses and benefits would be reflected in the price that would be bargained out in any completely free market between *any* willing buyer and *any* willing seller in the absence of the merger.

Id. (citing In re Valuation of Common Stock of Libby, McNeill & Libby, 406 A.2d 54, 62 (Me. 1979)).

Further, the trial court's determination was not based upon value New Bingham possessed "immediately before the effectuation of the [merger]," but on value which New Bingham and the minority shareholders, according to the trial court, should have received from Kennecott years earlier. But this scenario never occurred at all, and had it occurred it would have occurred much earlier than "immediately before" the merger as required by Utah's merger statute, Utah Code Ann. § 16-10a-1301(4).

Finally, the trial court's valuation amounts to an award of damages for breach of fiduciary duty arising from events which occurred many years prior to the merger, a claim never asserted during the life of the corporation. The court was led to do so by decisions from selected jurisdictions other than Utah in which evidence of breach of fiduciary duty was considered by the court and influenced the determination. See, e.g., Memorandum Decision on Plaintiff's Motion to Dismiss Counterclaim at p. 3, R. 1137 ("Memorandum Decision"), citing Fleming v. International Pizza Supply Corp., 676 N.E.2d 1051, 1057 (Ind. 1997).

In response to the complaint filed by appellant as required by Utah Code Ann. §16-10a-1330(1), Groesbecks filed a counterclaim for compensatory and punitive damages for breach of fiduciary duty. Appellant filed a motion to dismiss the counterclaim which the court granted, holding that the statutory appraisal procedure is the exclusive remedy available to a shareholder in these circumstances. The court went on to say, however, that it would "allow the Groesbecks to provide evidence of the alleged breach of fiduciary duty in order to assist the Court in determining what value that [sic] should be assigned to the shares at the time of the merger." R. 1137-1140. It is obvious from its judgment, however, that the trial court effectively overruled its own Memorandum Decision and awarded damages for breach of fiduciary duty after all.

In its Memorandum Decision the trial court interpreted Fleming to allow consideration of breach of fiduciary duty claims in a statutory appraisal proceeding. What the court failed to note when interpreting Fleming, however, was that the breach of fiduciary duty claims in Fleming involved events directly surrounding the merger itself.

There the dissenting minority shareholder raised the breach of fiduciary duty claims in litigation immediately following the transaction in which the majority shareholder voted in favor of selling substantially all of the company's assets to a new corporation.[1] Fleming 676 N.E.2d at 1052. The Fleming court allowed evidence of alleged breach of fiduciary duty in the appraisal action but in Fleming the actions in question were contemporaneous and affected the value of the shares *at the time of the transaction.* Fleming 676 N.E.2d at 1058. In contrast the Groesbecks point to breach of fiduciary duty that allegedly occurred years ago, a claim never raised by them during the life of the company. Their allegations are unrelated in time and impact to the merger itself. The trial court's reliance on Fleming to allow consideration of breach of fiduciary duty in the current appraisal action was incorrect.

Other state courts have not uniformly agreed even to consider evidence of breach of fiduciary duty in these circumstances. For example, in SIEG Company v. Kelly, 568

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[1] The timeline of events surrounding the litigation in Fleming was as follows: October 1988, Fleming (minority shareholder) and Jensen (majority shareholder) form International Pizza Supply Corporation ("International Corp"); May 1989, Jensen, Fleming and International Corp enter into a buy-sell agreement whereby a minimum price for Fleming's shares was set at $150,000 (an amendment increased the amount to $300,000); December 1990, Jensen enters into agreement to sell assets of International Pizza Supply Corporation to a new company, International Pizza Supply Company, Inc. ("IPS Co."); February 8, 1991, Jensen and his wife conduct meeting of the board of directors of International Corp., during which Jensen is elected to replace Fleming as president; February 19, 1991, Fleming is removed as a director; February 20, 1991, International Corp. sends notice of special shareholder meeting to Fleming advising him that directors of International Corp. had approved sale of all assets of International Corp. to IPS Co.; February 22, 1991, Fleming demands payment for his shares and dissents from the proposed sale of the assets of International Corp., to IPS Co.; March 15, 1991, International Corp sends Fleming notice of dissenters rights; Litigation commenced thereafter to determine share valuation. Fleming v. International Pizza Supply Corp., 640 N.E.2d 1077, 1078-79 (Ind. App. 1994).

N.W. 2d 794, 801 (Iowa 1997), the dissenting minority shareholders claimed that the majority shareholders had mismanaged the company over several years, reducing its value. The dissenters argued that they were entitled to a price based on the company's value prior to the alleged mismanagement. Id. The court, construing an appraisal statute identical to Utah's, considered the phrase "immediately before" controlling, and ruled that "[c]onsequently, it is the value of the stock *on that date* not some prior or subsequent date, that is important. This fact influences the events and factors that may properly be considered by the court...." Id. at 798 (emphasis added). In those cases where evidence of breach of fiduciary duty has been considered it is typically related in some way to the merger itself. See, e.g., Weinberger v. UOP, Inc., 457 A. 2d 701 (Delaware 1983) (allowing claims of fraud, misrepresentation, et al., to be considered in questioning the validity of a merger because the claims arose in close time proximity – several months – and in relation to the merger); SIEG Company v. Kelly, 568 N.W. 2d 794, 801 (Iowa 1997) (refusing to consider claims of wrongdoing unrelated to the merger); Cavalier Oil Corporation v. Harnett, 564 A. 2d 1137 (Delaware 1989) (considering a pre-merger corporate opportunity claim, but only because the parties stipulated to litigating it in the appraisal proceeding). There at least is some rationale for considering claims of breach of fiduciary duty related to the appraisal process because such behavior may undermine the integrity of the process by which fair value is determined. That is not the case in the instant litigation.

There are sound policy reasons why old claims for breach of fiduciary duty unrelated to the merger should not be allowed to influence the fair value determination in

a statutory merger proceeding. For example, fair value based upon a previously unasserted fiduciary duty claim will no longer reflect a value a buyer would have paid a seller for the stock as of the date immediately prior to the merger, as is required by the statute. Instead, it will artificially inflate the value by an award of damages never entered, for alleged past wrongs never asserted during the life of the company. In the real world no buyer would ever have agreed to pay the Groesbecks $1.325 million for their shares of this company.

To allow a breach of fiduciary claim to be raised for the first time in a statutory merger proceeding allows the claimant to avoid all of the common law and statutory protections that otherwise would protect against stale claims. In the instant litigation, for example, the Groesbecks knew in 1986 that Kennecott intended to begin stripping the surface of the New Bingham claims. They had the means if they desired to personally inspect the claims at any time by going to the public visitors center at the mine where the claims are in full view. Moreover, they were twice given the name and telephone number of the mine manager for the express purpose of arranging an inspection of the claims. They had demonstrated their ability to inspect records at the Utah Division of Oil, Gas & Mining to learn what mining was occurring. They were represented by counsel. They learned in 1992 details about Kennecott's mining plans but they never filed suit or even raised an objection. Instead, they waited until the company had been merged out of existence to assert their claims. By that time memories had faded and witnesses had almost all disappeared, leaving the trial court in the instant litigation to try to parse language in meeting minutes in an effort to determine even what had occurred.

To allow a review of the management of the corporation for past violations of fiduciary duties will allow dissenting shareholders to both reap the rewards of stock ownership during the life of the corporation, and then to pursue an antithetical course after the merger to gain additional rewards. Such a rule of law will allow a free pass at the time of any merger or dissolution to revive stale claims, with the dissenter already having received the benefit that the course of action might have provided the company. For example, in the instant litigation, had the Groesbecks raised their claims as they should have in the 1980's, Kennecott might have changed its mine plans, or the lease might have been renegotiated or ratified on the same terms with the Groesbecks being outvoted as they were in 1979, or any number of other consequences. Instead, by keeping quiet and accepting the status quo until after the merger, the Groesbecks avoided all of those risks and are now able to attack the management of the company with no risk to themselves or their investment whatsoever.

This proceeding effectively allowed Groesbecks to run New Bingham after the fact despite their having only a 3.8% minority interest. In 1979 the Groesbecks wanted to reject the lease because it did not pay enough. They were outvoted by all shareholders, including other minority shareholders. In 1986 they opposed amendment of the articles of incorporation, but were outvoted. At the time of the 1997 merger, all of the shareholders voted to approve the merger and the valuation except Groesbecks. But now that all other shareholders are gone, and the company no longer exists, the court, by ruling as it did, allowed Groesbecks alone to revise history and hypothetically manage the company by determining that the company would terminate the lease and hold out for a

new lease for $36 million dollars. By doing so the court not only rewrote history, but swept away all controls that would otherwise exist for management of a corporation and allowed Groesbecks to preempt the votes of all other shareholders.

Finally, to allow claims for breach of fiduciary duty to be pursued in a statutory merger proceeding avoids all of the requirements for shareholder derivative suits which have evolved over time in the common law and by statute and which would otherwise pertain. Claims that the corporation has been injured by breach of fiduciary duty are derivative and properly are enforced by the corporation in a shareholder derivative suit. Warner v. DMG Color, Inc.,20 P.3d 868, 872 (Utah 2000). Derivative suits are "those which seek to enforce any right which belongs to the corporation." Richardson v. Arizona Fuels Corp., 614 P.2d 636, 639 (Utah 1980). Utah Code Ann. § 16-10a-740 sets forth the procedures for initiating a shareholder derivative suit which include among other things written demand on the directors and a complaint pled with particularity. Here the Groesbecks were able to bypass the procedures (15 years later) required of a shareholder derivative suit. By allowing shareholder derivative claims to be heard in the appraisal proceeding the court is setting a precedent that stands to nullify the purpose of Utah's derivative proceedings statute and associated common law.

II. THE COURT IMPROPERLY RELIED ON EXTRINSIC EVIDENCE TO DISREGARD KENNECOTT'S RIGHTS UNDER THE MINING LEASE.

Kennecott mined the surface of the New Bingham claims pursuant to the rights granted under the mining lease (Ex. 3), which Anaconda obtained originally from New Bingham in 1979 before Anaconda sold its 86% of New Bingham to Kennecott.

Kennecott succeeded Anaconda to the lease. In order to conclude that the New Bingham management breached its fiduciary duties to the minority shareholders the trial court had to disregard Kennecott's rights under the lease.

In the 1979 mining lease Anaconda was granted the right in the broadest possible terms to mine the New Bingham claims:

> III. RIGHTS GRANTED
>
> 3.1 Lessor hereby grants to Anaconda during the term hereof the exclusive right, subject to the terms hereof:
>
> . . . .
>
> (b) to develop, extract, take, mine, save and sell minerals from the Property, and to engage in related operations with respect to all veins, loads and mineral deposits contained in or on the Property, to construct and maintain on the Property all works and buildings and other structures, machinery and facilities necessary for such mining and related operations;
> . . . .

Ex. 3. Kennecott succeeded to the position of Anaconda under the lease as a result of the 1985 asset purchase and Kennecott thereafter conducted mining operations simultaneously on the New Bingham claims and on Kennecott's own claims surrounding the New Bingham property (much of it acquired from Anaconda) pursuant to the terms of the lease. The one remaining witness who had been a member of the New Bingham management testified that he and other managers read the lease after the 1985 transaction and believed that the lease gave Kennecott the right to mine the surface of the New Bingham claims. R. 1192, p. 122. Further, he believed that it was in the best interest of New Bingham to keep the lease as it was the company's only source of revenue. R. 1192, p. 121.

At trial evidence was taken regarding the nature of surface mining operations. Surface mining by definition is the removal of the surface of the earth. The type of mineralization located on the surface of the New Bingham claims was disseminated prophyry ore that was spread throughout the claims. R. 1192, p. 83. Whether material removed from the surface of a claim is waste or ore is an economic determination. When minerals are encountered in sufficient concentration and quantity to be economical, the material is classified as ore. Any material that falls below the economic cut off is waste. Ore is processed. Waste goes to the mine dump. The process of removing waste or overburden is sometimes referred to as "stripping." Stripping is part and parcel of surface mining. R. 1192, pp. 81-82, 116.

Evidence was also taken at the trial, and not disputed, that the New Bingham claims were too small to be mined independently. The company had no employees or equipment or capability to mine the claims. The claims were surrounded by property owned by others and there was not enough property to conduct a surface operation. R. 1192, pp. 122-123. The only way in which New Bingham could realize value from its claims was to partner with a larger, adjoining operation which would mine the claims, bear the expense of a work force, equipment and the removal of overburden, and pay New Bingham a royalty on any ore removed. R. 1192, pp. 122-123.

Anaconda first served that function, but quickly demonstrated that underground mining of the claims could not be sustained economically. With the disappearance of Anaconda the only option for New Bingham was surface mining by Kennecott as part of Kennecott's own operation. R. 1192, pp. 123-124.

Both the former New Bingham manager and the experts called by the Groesbecks at trial agreed that stripping of overburden is part of surface mining and that surface mining is not possible without stripping. R. 1192, p. 116; R. 1194, p. 344. After admitting that in order to mine on the surface, a miner has to strip the surface, Groesbecks' expert witness went so far as to admit:

> Q. And so surface mining rights, by necessary implication, includes stripping rights, does it not?
>
> A. By implication, I would think so yes.

R. 1194, pp. 344.

Groesbecks' expert also admitted that "[i]f the lease provides Kennecott with the right to strip that land, then the value of the New Bingham-Mary Mining Company is $2.2 million." R. 1194, p. 335.

Not surprisingly, Groesbecks' expert was not asked to render an opinion in this case about whether or not the 1979 lease allowed Kennecott to mine the surface. He was simply asked to assume, and did assume for purposes of his analysis, that there was not a lease in place that would allow Kennecott to mine the surface. R. 1194, p. 343. In contrast, the trial court specifically found that the terms of the lease did include the right to mine the surface and to strip the surface of the claims. Finding of Fact no. 24, R. 1141.

Under these circumstances the trial court, in order to conclude that New Bingham management had breached fiduciary duties by allowing Kennecott to mine the surface of the New Bingham claims, and to award Groesbecks additional compensation for the right to strip overburden, had to disregard its own findings and to disregard Kennecott's rights

under the express terms of the mining lease. It did so by admitting and considering extrinsic evidence to interpret the lease. In Findings of Fact nos. 15 and 16 and Conclusion of Law no. 51 the court concluded:

> 15. On August 18, 1978, New Bingham Mary sent a letter to its shareholders informing them: 'An agreement is now being negotiated between Anaconda and [New Bingham] Mary that will permit Anaconda to conduct under-ground mining operations on the Mary and Commonwealth claims through the facilities of [Anaconda's] Carr Fork mine.' The letter also stated: 'Also there have been negotiations between officials of Anaconda, your management and officials of Kennecott to agree on a three-party cross-stripping agreement which would allow Kennecott to expand the boundaries of its Bingham open-pit mine by stripping waste material and low-grade ore material from the surface of property of Anaconda and New Bingham Mary adjacent to the present boundaries of the Bingham pit.'
>
> 16. Based on the statements of Anaconda, the intent of the proposed lease was to allow Anaconda to mine ore from the Claims by underground mining methods, but was not intended to convey the right to strip waste material from the surface of the Claims for the purpose of obtaining access to ore on adjacent property.
>
> 51. Extrinsic evidence concerning the intent of the parties to the Lease is admissible to allow the Court to determine whether the Lease is ambiguous and, if so, to interpret the Lease . . . .

R. at 1142-1167.

The law does not allow the trial court to introduce extrinsic evidence concerning an integrated, unambiguous lease that effectively rewrites the lease for the benefit of one of the parties. Plateau Mining Company v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990) ("The plain meaning rule preserves the intent of the parties

and protects the contract *against judicial revision*) (emphasis added). The parol evidence rule is specifically designed "to preserve the sanctity of written instruments." Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1205 (Utah 1983). "Simply stated, the rule operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract." Hall v. Process Inst. & Control, 890 P.2d 1024, 1026 (Utah 1995) (citations omitted). Under the parol evidence rule, the language of an integrated, unambiguous contract is to be given its plain and ordinary meaning, and the parties' intent is to be determined solely from the four corners of the agreement, without resort to any extrinsic evidence. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). Extrinsic evidence should only be considered by a court after first considering the language of the contract itself, "and accord to it the weight and effect which it may show was intended." Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977). Additionally, the existence of ambiguity in a contract is a question of law. Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983).

There is no finding by the trial court that the contract language of the lease is ambiguous, or what specific language is ambiguous. If the court had first carefully considered the lease language it would have correctly determined that no ambiguity existed regarding the rights granted the lessee, and that there is no reference whatsoever to the "purpose" of the lessee, or to any requirement that lessee be motivated by a desire to benefit the lessor more than itself. The court effectively rewrote the lease to add the

requirement that the lessee's purpose in mining must be primarily to benefit the lessor's, not the lessee's operation. There is nothing in the lease which requires any such demonstration of the lessor's motivation, nor would there ever be since no partner would undertake to mine 16 acres of ground unless by doing so it could benefit its own operation. No ambiguity existed in the lease language and the extrinsic evidence used by the court was inadmissible.

Further, the Court's Finding of Fact no. 15 was based on statements of intent it gleaned from an informational letter to New Bingham shareholders dated August 18, 1978 discussing various subjects. The court failed to consider the other expression of intent in advance of the vote on the lease, that being the official proxy statement dated April 4, 1979 which advised shareholders of the meeting to be held April 25, 1979 to vote on the lease, and which described the lease in anticipation of the vote. Ex. 125. The proxy statement does not support the court's interpretation. In the proxy statement the management explained that Anaconda was developing an underground copper mine that would be the "most efficient method of extracting the mineralized metal" from the New Bingham claims. However, the proxy statement also reported,

> estimates of additional tonnages of mineral resources have been made. These are classified as two basic types: Skarn or replacement mineralization - - 150 million tons averaging 1.3% total copper; and disseminated mineralization - - 264 million tons at an average grade of 0.56% total copper. The skarn deposit could be mined by underground methods and the disseminated tonnage could be developed by a combination of open pit and underground mining methods. Additional drilling will be required to verify these tonnages and grades prior to consideration of a specific mining plan.

Ex. 125, p. 2 (emphasis added). The proxy statement further explained, under the heading "Description of Proposed Lease":

> The essential terms of the proposed mining lease are as follows:
>
> 1. Purpose. Anaconda acquires the right to occupy and use the MARY and COMMONWEALTH lode mining claims to explore for, extract and sell minerals subject to certain royalty payments.

Id., p. 4. The mining rights were described in broad terms with no suggestion that mining could only occur underground.

If extrinsic evidence is considered the evidence supports the interpretation that Anaconda was developing an underground mine at the time of this lease, and that underground mining was the method anticipated to be employed immediately. But the language of the proxy statement also indicated that there was an even larger quantity, at a lower grade, of disseminated tonnage that could be mined by a combination of open pit and underground mining methods. The proxy statement did not describe the lease for purposes of the voting shareholders as one restricted to underground mining, and the lease itself in no way restricts mining to underground methods.

The lease granted the right to mine the New Bingham claims with no restriction as to the mining method. The distinction the trial court drew between stripping and mining is contrary to the evidence, contrary to how they are used in the mining industry, and contrary to the court's own findings. The court erred in admitting extrinsic evidence to alter the terms of the lease, and erred in concluding that the lease did not allow Kennecott to benefit in the process of mining the New Bingham claims.

III. THE COURT'S CONCLUSION THAT AN ARM'S-LENGTH NEGOTIATION WOULD HAVE RESULTED IN COMPENSATION TO NEW BINGHAM IN THE AMOUNT OF $36 MILLION IS INHERENTLY SPECULATIVE AND NOT SUPPORTED BY THE EVIDENCE.

The court concluded in Finding of Fact no. 34 as follows:

> 34. Had the Lease been terminated, New Bingham Mary would have been entitled to negotiate a new lease on the Claims as of 1987. An arm's length negotiation would have resulted in fair and reasonable compensation to New Bingham Mary for the value of stripping rights, the value of shallower, porphyry that can be mined using open-pit methods, and the value of deeper, skarn ore that can be mined using underground mining methods.

R. 1141. The court then went on to conclude that the amount of compensation negotiated would have been $36 million. This conclusion is inherently speculative and not supported by the evidence. It is undisputed that none of these events occurred.

The lease was not terminated. As part of the follow-up to the 1985 asset purchase the lease was assigned by Anaconda to Kennecott but the requirement that written consent of New Bingham be obtained in advance was overlooked. R. 1193, p. 207. The lease provides that such consent will not be unreasonably withheld. Ex. 3, para. 15.1. When Kennecott realized that the consent had been overlooked, written consent was obtained. The lease was not terminated because, as the former member of New Bingham management testified, the management believed the lease allowed Kennecott to mine the surface (R. 1192, p. 122), Kennecott was the only miner available to work the claims (Id., p. 123), and the lease was the company's only source of revenue. Id., p. 121. Had this issue been put to shareholders in 1987 it is equally likely that the same result would have prevailed as was obtained in the 1979 vote on the lease. There the Groesbecks

complained that the company was not getting enough money for the lease and voted against it, but none of the other minority shareholders agreed with them. There is no reason to believe that the shareholders would have voted to eliminate the only source of income from the claims which the company had enjoyed in 50 years, abandon even any pretense of being a mining company, and instead try to hold up Kennecott for $36 million.

Neither was there a negotiation of a new lease. Had there been, the evidence certainly does not support the conclusion that Kennecott would have agreed to pay $36 million under a new lease, and in fact compels the opposite conclusion. Kennecott waited years to buy all of Anaconda's property, of which the New Bingham claims was a fraction (and only a fraction of the acquired land used to expand the pit), refusing to pay tens of millions of dollars for it.

Evidence that can be marshaled in support of the trial court's finding is the opinion from Groesbecks' expert of the value of the mineralization available to Kennecott as a result of incorporating the New Bingham claims into Kennecott's mining operation, and his opinion that a prudent buyer in hypothetical circumstances (but not necessarily Kennecott) would agree that $36 million is fair compensation for the right to access that mineralization. Also there was evidence that Anaconda was getting out of the mining business. R. 1193, p. 149. The price paid by Kennecott was described by a former Kennecott manager as "a nuisance value," a "minor amount of money . . . compared to the investment Anaconda had made in that property." Id., p. 147. The same witness described two other properties that Anaconda had sold at the same time at bargain prices.

Id., pp. 149-151. Kennecott had studied the value to it of access to the Anaconda property and concluded that such access might result in millions or even billions of dollars in increased revenue, depending on the economic and other assumptions. Ex. 101, 102; R. 1193, pp. 165-168.

On the other hand, a Kennecott manager testified at trial that, despite studies concluding that access to all of the Anaconda property could mean hundreds of millions of dollars in increased gross revenues to Kennecott (from gaining access to its own ore), Kennecott never offered or even considered offering to Anaconda tens of millions of dollars for Anaconda's property. R. 1192, p. 104. Anaconda for its part never demanded that it be paid some percentage of the money it anticipated Kennecott would be able to earn by expanding the Bingham pit. Id., p. 108. Instead Kennecott paid and Anaconda accepted $5 million for many more acres than the 16 occupied by the New Bingham claims, and now incorporated into Kennecott's operation. Anaconda was a rational economic actor. R. 1193, p. 223. Anaconda knew that Kennecott wanted to buy Anaconda's property so that Kennecott could expand its pit. Id., pp. 223-224. The trial court failed to consider at all the Anaconda sale, which had occurred only two years before the negotiation of a new lease with New Bingham would supposedly have occurred. Groesbecks' experts, upon whose testimony the court relied to establish the value for a new lease, specifically disclaimed at trial any opinion about what would have happened had Kennecott and New Bingham actually negotiated a new lease. R. 1194, pp. 343-344. In fact, such a negotiation would strongly have favored Kennecott since Kennecott already had the right to mine the claims and would have disputed even the

premise leading to any renegotiation. Kennecott had a viable ongoing operation without incorporating the New Bingham claims and could have reconfigured its mine and waited out New Bingham. R. 1192, p. 125; R. 1194, pp. 346-347. In short, there is simply not a sufficient evidentiary basis upon which to conclude that, under the circumstances actually existing between New Bingham and Kennecott in 1987, Kennecott would have agreed to pay such an enormous sum of money.

IV. THE COURT'S CONCLUSION THAT MINORITY SHAREHOLDERS DID NOT HAVE NOTICE OF THEIR LEGAL CLAIMS IS NOT SUPPORTED BY THE EVIDENCE.

In Finding of Fact no. 33 the court concluded that the minority shareholders did not have notice of Kennecott's activities on the mining claims prior to the merger. In Finding of Fact no. 48 the court concluded that the preponderance of the evidence does not show that any minority shareholder discovered or in the exercise of reasonable care should have discovered the breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors. The conclusions are not supported by the evidence.

The Groesbecks' actions over the years show that as a matter of course they harbored deep suspicions about the majority shareholder, whether it was Anaconda or Kennecott. They were always represented by counsel. Groesbecks were obviously familiar with the terms of the lease because in 1979 they appeared at the shareholder meeting with their lawyer to argue against specific provisions in the lease. Ex. 2. In 1982, through their lawyer, they wrote to Anaconda to demand an accounting. They revealed that they knew mining was occurring on New Bingham claims because they had researched records at the Utah Division of Oil Gas & Mining. They alleged that the

rights of minority shareholders had been disregarded. Ex. 5. Groesbecks also revealed in their 1982 letter, "we also have reason to believe that Kennecott Copper may also be conducting a surface mining operation on the New Bingham claims." Id. Although Kennecott was not mining on the claims at that time, Groesbecks obviously knew that the claims were close enough to Kennecott, and of sufficient interest to Kennecott, to make Kennecott's mining of the claims a real possibility. In fact, Clay Groesbeck admitted at trial that he had known since 1978 that the New Bingham claims were of interest to Kennecott and might be of some value for Kennecott operations. R. 1193, p. 246.

The trial court failed to consider the 1986 shareholder meeting. In 1986, after the New Bingham management had been replaced by employees of Kennecott, New Bingham held a shareholders meeting at which the purchase of Anaconda's assets by Kennecott was discussed and at which the management announced the plans of Kennecott in unmistakable terms: "Kennecott intends to mine across the claims for waste removal and construction of the roads." Ex. 12. As both the former Kennecott employee and the Groesbecks' experts admitted at trial, waste removal is "stripping", the activity about which the Groesbecks have since expressed such surprise.

Following the 1986 meeting the Groesbecks met with Kennecott managers. Ex. 15,16; R. 1193, p. 251. They demanded and received records of New Bingham. Ex. 17; R. 1193, pp. 252-253. They demanded but were refused detailed information about Kennecott's mining plans (R. 1193, p. 253) but they did not pursue the issue. Among the materials they did receive were another copy of the 1979 mining lease and a location map for the New Bingham claims. Ex.17; R. 1193, p. 133. Groesbecks were twice given the

name and telephone number of the Kennecott mine manager to contact to arrange to see the claims, an opportunity they never took advantage of at that time or any subsequent time. R. 1193, pp. 251, 254-256. They also never went to the Kennecott visitors center, which is open to the public, and which affords a view of the claims. R. 1193, p. 256.

At the 1992 shareholder meeting the New Bingham managers talked in detail about the mine plan and revealed the specific tonnages Kennecott anticipated would be removed from the New Bingham claims. Ex. 22. The trial Court did not consider this detailed information conveyed to shareholders at the 1992 meeting. Also at the 1992 meeting shareholders were told that a topical map was available and would be sent to all shareholders requesting it. Id.

The court found that minority shareholders were not told of the value Kennecott had earlier placed on the Anaconda property. The evidence shows, however, that the studies Kennecott did of the potential value of access to the Anaconda property were highly confidential and were not revealed outside a small management group at Kennecott. Those studies were never revealed at all outside that group until Kennecott was forced to produce them pursuant to a subpoena and an order compelling production over Kennecott's objection in this litigation. R. 1192, pp. 104-105. Regardless who was managing New Bingham, the company would never have had access to Kennecott's confidential analyses, and that information would not have been available to the Groesbecks.

Evidence which can be marshaled to support the court's conclusion is that, at the 1986 shareholder meeting, when asked whether in the future the claims would be mined

by open pit, the New Bingham Management said "probably not in the near future [illegible] at depth – high cost." Also at that meeting shareholders were told "we'll research history of discussions between Anaconda/Kennecott/Bingham Mary", but the management witness at trial testified that he did not know what issue that referred to, but that he was not aware that anyone from New Bingham or Kennecott ever did that research. R. 1193, pp. 185-186. Because stripping did not start until 1989, the Groesbecks, had they gone to the mine in 1986 or 1987, would not have seen mining on the claims. Id., p. 204. The 1992 shareholder meeting minutes do not reveal management saying specifically that mining had been proceeding on the claims for three years as of that time. Ex. 22. In the 1992 meeting management advised shareholders that the New Bingham Mary claims were "above and around the open-pit". Ex. 22. Management did not reveal to minority shareholders the value to Kennecott of access to the New Bingham claims. Management did not reveal to minority shareholders that, because assignment of the lease had inadvertently preceded written consent by New Bingham, New Bingham had the right to terminate the lease. R. 1193, p. 214. Clay Groesbeck testified that as of 1992 he was not aware of any information that caused him to believe the minority shareholders needed to bring an action against the officers and directors of New Bingham Mary. R. 1193, p. 238.

On balance, the overwhelming evidence shows that since at least 1986 the Groesbecks knowingly sat on their legal claims against New Bingham speculating that New Bingham's 3% production royalty and the $25,000 annual income on their small isolated parcel was preferable to imaginary alternatives. Before the lease New Bingham

had lain dormant for five decades (1928-1979), apparently producing no income at all. Once the Groesbecks had been bought out there was no consequence to their taking a broadside at New Bingham's single mining lease, the only business the company ever had over its seventy year life. A number of familiar legal doctrines should prevent them from doing this.

One is the statute of limitations. Utah Code Ann. § 78-12-27 sets a three year limitation on actions against corporate directors. Nothing in Utah's merger statute, including the provision relating to appraisal rights for minority shareholders, trumps the statute of limitations and permits the revival of stale independent or affirmative claims.

The statute of limitations applies to the Groesbecks because their claims are not defensive. Rather, they are independent causes of action (though no longer denominated as such following the dismissal of their counterclaims) and seek affirmative relief. See Sharon Steel Corp. v. Aetna Cas. and Sur. Co., 931 P.2d 127, 132-33 (Utah 1997); Jacobsen v. Bunker, 699 P.2d 1208, 1210 (Utah 1985). Moreover, based on information provided at the 1986 shareholders meeting, the Groesbecks were expressly put on notice as to the intentions of Kennecott to mine across the claims for waste removal. As such, the statute of limitations on any causes of action the Groesbecks may have had against New Bingham began to run as of the 1986 shareholders meeting. Further, the discovery rule does not allow a plaintiff to delay filing suit until he has ascertained every last detail of his claim. All that is required to trigger the statute of limitations is sufficient information to apprise the plaintiff of the underlying cause of action so as to put him on notice to make further inquiry if he harbors doubts or questions about the defendant's

actions. McCollin v. Synthes, Inc. 50 F. Supp.2d 1119, 1124 (D. Utah 1999), quoting United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 889 (Utah 1993). One who is put on inquiry notice of a potential harm must exercise due diligence to inquire into the situation, and the limitations will not be tolled while the plaintiff makes this inquiry. See Walker Drug Co. v. LaSal Oil Co., 902 P.2d 1229, 1231-32 (Utah 1995). At the very least the evidence supports the conclusion that the Groesbecks were on inquiry notice beginning in 1986, yet they did nothing.

Groesbecks' claims are also barred by the doctrine of laches. It is a longstanding axiom that "equity aids the vigilant and not those who slumber on their rights." Black's Law Dictionary 875 (6th ed., West 1990) (defining laches). The Groesbecks were put on notice in 1986 that Kennecott intended to mine across the surface of the New Bingham claims and were given the name and telephone number of the mine manager to come and see for themselves. For the next twelve years the Groesbecks, New Bingham and all other shareholders sat idly by as Kennecott mined the claims and New Bingham earned royalties.

Utah courts will bar a claim under the doctrine of laches when two elements are met: (1) lack of diligence on the part of the claimant; and (2) injury to the defendant due to the lack of diligence. Papanikolas Bros. Ent. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975). Utah courts have often used the length of a claimant's delay when analyzing the first element of laches. See e.g., Jones Min. Co. v. Cardiff Min. & Mill, 191 P. 426, 433 (Utah 1920) (upholding a laches defense after fifteen years); Raht v. Sevier Mining & Milling Co., 54 P. 889, 891 (Utah 1898) (upholding a laches

defense after four years). Here the Groesbecks waited twelve years after the 1986 shareholder meeting to first complain about surface mining, and did not assert their claim in litigation until they filed their counterclaim after the passage of fifteen years.

In the context of mining cases, Utah courts have interpreted the second element as met when an unjust windfall accrues to a claimant who sat on his rights, essentially speculating that the rights would be more valuable at a later date. In Jones Min. Co., for example, the court barred plaintiff's claim that it had been defrauded out of a mining claim because plaintiff had failed to assert its rights for fifteen years, during which time the defendant had developed the claim and made it valuable. The following language describes the principle:

> There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstance, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.

Jones Min. Co., 191 P. at 430 (quoting Patterson v. Hewitt, 195 U.S. 309, 321 (1920).

The Groesbecks did not bring their claims when there was the risk of opposition from other shareholders or the risk that the current mining lease might have been lost as a result. They have done so only now when there are no other shareholders and no risk of chasing off the lessee with litigation, and years after Kennecott committed itself to a mining plan and cost structure incorporating the mining claims of New Bingham. It is

just such behavior that the Utah Supreme Court vigorously opposed when upholding a laches defense in the Jones case.

Finally, defendants' claims are barred by the doctrine of equitable estoppel. In 1986 the Groesbecks were told that Kennecott intended to mine across the surface of the claims. They were reminded again in 1992 in very explicit terms when management described the millions of tons of ore to be mined from the New Bingham claims pursuant to Kennecott's mine plan. From 1986 until 1998 there was never once a suggestion by New Bingham, the Groesbecks or any other shareholder that surface mining was precluded by the lease. Kennecott relied on the inaction and lack of objection by New Bingham and the Groesbecks and invested capital and undertook all the risks associated with mining to expand its pit and recover ore for itself and New Bingham.

The doctrine of equitable estoppel "prevent[s] one party from deluding or inducing another into a position where he will unjustly suffer loss." Koch v. J.C. Penney Co., Inc., 534 P.2d 903, 905 (Utah 1975). The elements of estoppel are : (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Dep't of Human Servs. Ex rel. Parker v. Irizarry, 945 P.2d 676, 680 (Utah 1997). Failure to object over a period of time supports an estoppel claim. Brixen & Christopher, Architects v. Elton, 777 P.2d 1039, 1044 (Utah App. 1989) (party's failure to object to architect's work on subsequent phases of a project over a six month

time period was evidence of conduct other party could reasonably rely on when proceeding with project).

There is no evidence that at any time during any of the shareholder meetings or the private meetings with Kennecott mine managers, or in any other manner, did the Groesbecks or any other minority shareholder raise any objection to Kennecott's plans to mine across the surface and to remove millions of tons of material from the New Bingham claims. Neither did Groesbecks file suit. What Kennecott was doing was certainly not hidden. Its mine is visible to the public and Groesbecks had an invitation to receive a personal tour of the claims. The conclusion the evidence supports is that the Groesbecks and the other minority shareholders were happy to have Kennecott mining their claims and paying them royalties under the lease.

CONCLUSION AND RELIEF SOUGHT

The trial court's judgment does not reflect the fair value of New Bingham stock as of the time of the merger, but rather represents an award of damages for a lawsuit never filed and a value far removed from a realistic appraisal.

Appellant requests that the lower court judgment awarding compensation for "stripping rights" be reversed, and that Groesbecks be awarded compensation based on the market value of the stock at $3.50 per share, less $1.10 per share already paid, or a total of $88,322.40, plus interest.

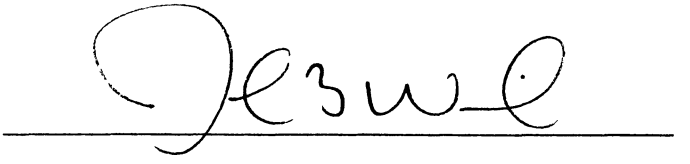
DATED this 7th day of May, 2004.

JOHN B. WILSON
PARSONS BEHLE & LATIMER
Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2004, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF THE APPELLANT**, to:

Robert S. Clark
Daniel E. Barnett
Attorney for Defendants and Appellees
Parr, Waddoups, Brown, Gee & Loveless
185 South State, Suite 1300
Salt Lake City, UT 84111



ADDENDUM

1. Utah Code Ann. § 16-10a-1330(1), § 16-10a-1301(4)
2. Memorandum decision. R. 1137-1140.
3. Judgment. R. 1168-1171.
4. Findings of Fact and Conclusions of Law. R. 1141-1167.
5. 1979 Mining Lease between Anaconda and New Bingham Mary. Ex. 3.
6. Aerial photograph of property. Ex. 26.

Tab 1

16-10a-1330. Judicial appraisal of shares – Court action.

(1) If a demand for payment under Section 16-10a-1328 remains unresolved, the corporation shall commence a proceeding within 60 days after receiving the payment demand contemplated by Section 16-10a-1328, and petition the court to determine the fair value of the shares and the amount of interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay each dissenter whose demand remains unresolved the amount demanded.

16-10a-1301. Definitions.

For purposes of Part 13:

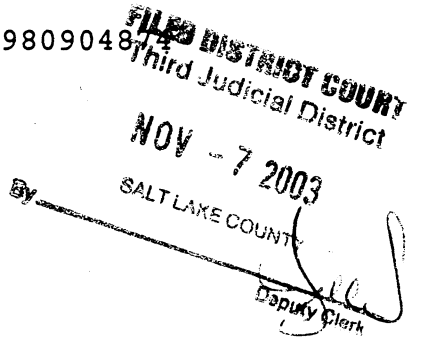
(4) "Fair value" with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.

Tab 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BINGHAM CONSOLIDATION COMPANY,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 980904874
vs.	:	
ROBERT GROSBECK, an individual; MARILYN GROSBECK GLADE, an individual; and ROBERT GROSBECK AND R. CLAY GROSBECK, as Trustees of the ROBERT R. GROSBECK LIVING TRUST, a Utah Trust,	:	
Defendants.	:	



This matter was tried to the bench and was taken under advisement at the conclusion of trial, and the Court now issues its Memorandum Decision.

The Court accepts the Stipulation of Facts of the parties and, as stated therein, the issue for determination by the Court is the fair value of defendants' shares of New Bingham Mary Mining Company pursuant to Utah Code Ann., Section 16-10a-1330.

In its capacity as the majority and controlling shareholder of New Bingham Mary Mining Company, plaintiff owed defendants fiduciary duties, including the duty to maximize value for all shareholders, and the duty to act in a fair and responsible manner with respect to the minority shareholders.

Plaintiff caused the affairs of the New Bingham Mary Mining Company to be operated in a way which was to its benefit and to the detriment of the minority shareholders. This constitutes a breach of fiduciary duty on the plaintiff's part. The appraisal presented by the plaintiff at trial was not independent and was based on information that could only lead to a determination that was unfairly favorable to the plaintiff. The Court adopts the appraisals and methodology of Mr. Guarnera and Mr. Bellum with respect to the fair value of the property.

With respect to specific findings, the Motions in Limine by both parties are denied.

To fail to consider the stripping rights on the property would simply be unfair to the defendants. Plaintiff failed to disclose information regarding its plan to strip mine the company, and the value of said strip mining from the minority defendants. There are obvious conflicts of interest between plaintiff and defendants which conflicts result in the aforementioned breach of fiduciary duty and also acted to the detriment of the defendants. The Court finds that the Lease and assignment thereof included stripping rights, and that plaintiff didn't make full disclosure to defendants, failed to be candid about its plans, or the financial implications of its plans. Interest should be awarded to the defendants at the legal rate from the date that defendants were

paid, at the rate of $1.10 per share, and at the Judgment rate after the Judgment is signed.

Counsel for defendants shall prepare Findings, Conclusions and a Judgment, and shall include in the Findings of Fact all findings consistent with the evidence and this Memorandum Decision.

I apologize for the time it has taken to reach this Decision, and want to acknowledge counsel on both sides of the case as having presented the matter professionally, fairly and efficiently.

Dated this 1 day of November, 2003.

By _____
STEPHEN L. HENRIOD
DISTRICT COURT JUDGE

STAMP USED AT DIRECTION OF JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this_____ day of November, 2003:

John B. Wilson
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Daniel E. Barnett
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_____

Tab 3

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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

BINGHAM CONSOLIDATION COMPANY, Plaintiff, v. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK and R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust; Defendants.	~~[PROPOSED]~~ **JUDGMENT** ENTERED IN REGISTRY OF JUDGMENTS DATE 01/20/04 Civil No. 980904874 Judge Stephen L. Henriod

This matter was tried to the bench on August 4, 5, and 6, 2003, Honorable Stephen L. Henriod, District Court Judge, presiding. The issues having been duly tried and the Court having duly entered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED AND ADJUDGED that Defendants recover from Plaintiff the amount of $1,325,204.00, plus prejudgment interest at the legal rate of ten percent per year from February 18,

1998 to January 13, 2004, of $781,870.36. Defendants therefore recover from Plaintiff the amount of $2,107,074.36 as follows:

	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	$530,067.20	$312,739.64	$842,806 84
Robert Groesbeck	$530,103.21	$312,760.89	$842,864 10
Robert R. Groesbeck Living Trust	$265,033.60	$156,369.82	$421,403.42;

It is hereby further

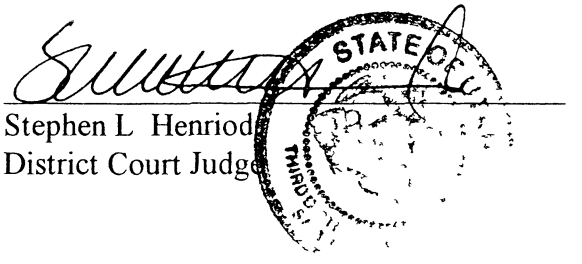
ORDERED AND ADJUDGED that Defendants recover from Plaintiff interest at the rate of $3,630.70 per day from January 14, 2004, until the date this Judgment is signed as follows: Marilyn Groesbeck Glade, $1,452.24 per day; Robert Groesbeck, $1,452.34 per day; and Robert R. Groesbeck Living Trust, $726.12 per day; It is hereby further

ORDERED AND ADJUDGED that each Defendant recover from Plaintiff interest at the judgment rate of 3.41 percent per year or as that rate may change from time to time from the date this Judgment is signed until this Judgment is satisfied; and It is hereby further

ORDERED AND ADJUDGED that Defendants recover from Plaintiff their costs incurred in this lawsuit.

DATED this 15 day of January, 2004

BY THE COURT



Stephen L Henriod
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2004, I caused a true and correct copy of the foregoing *[Proposed] Judgment* to be served via hand delivery, on the following:

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Windy Manning

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Tab 4

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

BINGHAM CONSOLIDATION COMPANY, Plaintiff, v. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK and R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust; Defendants.	~~[PROPOSED]~~ **FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 980904874 Judge Stephen L. Henriod

This matter was tried to the bench on August 4, 5, and 6, 2003. The Court accepted the Stipulation of Facts presented by the parties. Plaintiff's Trial Exhibits 1 through 26 were offered and accepted into evidence. Defendants' Trial Exhibits 100 through 131 were offered into evidence. Plaintiff objected to admission of Defendants' Trial Exhibits 108, 125, and 128. The Court took Plaintiff's objections under advisement. Testimony was taken from Gerald P. Halmbacher and

William K Orchow on behalf of Plaintiffs, and from Robert Clay Groesbeck, Barney J Guarnera, and Donald P Bellum on behalf of Defendants The matter was taken under advisement at the conclusion of trial The Court's Memorandum Decision was entered on November 7, 2003 The Court now makes the following findings of fact and conclusions of law

FINDINGS OF FACT

1. New Bingham Mary Mining Company ("New Bingham Mary") was a Utah corporation As of December 31, 1997, Defendants Robert Groesbeck, Marilyn Groesbeck Glade, and Robert Groesbeck and R Clay Groesbeck as Trustees of the Robert R Groesbeck Living Trust (collectively, "Defendants") collectively owned 36,801 of 971,200 issued and outstanding shares of stock in New Bingham Mary ("Shares") as follows Robert Groesbeck, 14,721 Shares, Marilyn Groesbeck Glade, 14,720 Shares, and Robert R Groesbeck Living Trust, 7,360 Shares

2 New Bingham Mary was incorporated on April 8, 1929 Roy Groesbeck, the father of Defendants Robert Groesbeck and Marilyn Groesbeck Glade was one of the incorporators of New Bingham Mary in 1929, served as an original director of New Bingham Mary, and served as New Bingham Mary's first President Members of the Groesbeck family have been minority shareholders of New Bingham Mary during the entire nearly 70-year existence of New Bingham Mary, from the date of its incorporation until its merger with and into the plaintiff in this lawsuit, Bingham Consolidation Company ("Bingham Consolidation")

3. Pursuant to a merger agreement ("Merger") among New Bingham Mary, Bingham Development Company, and plaintiff Bingham Consolidation, New Bingham Mary and Bingham Development Company were merged with and into Bingham Consolidation effective January 1, 1998.

Kennecott Utah Copper Corporation (together with its predecessor in interest, Kennecott Corporation, "Kennecott") is the sole shareholder of Plaintiff, the surviving corporation pursuant to the Merger

4 Defendants dissented from the Merger and Defendants properly perfected their dissenter's rights Defendants complied with the requirements of Utah Code Ann § 16-10a-1330 et seq. and are entitled to an award equal to the fair value of their Shares.

5. Defendants were paid by Bingham Consolidation on the basis of $1 10 per Share for their Shares

6 Except for the dispute regarding the obligation to pay fair value for Defendants' Shares, the Merger was otherwise conducted in accordance with Utah Law

7 This lawsuit was filed May 14, 1998 The issue for determination by the Court in this lawsuit is the fair value of Defendants' Shares of New Bingham Mary pursuant to Utah Code Annotated § 16-10a-1330

8. New Bingham Mary's principal assets consisted of two patented mining claims, the Mary and Commonwealth lode claims ("Claims") The Claims are now located within the Bingham open-pit copper mine ("Bingham Mine") operated by Kennecott The area of the Oquirrh Mountains in the vicinity of the Claims and the Bingham Mine where mining has taken place over the past several decades is referred to herein as the "Bingham District "

9. The Claims and the surrounding area of the Oquirrh Mountains within the Bingham District contain two kinds of ore· higher-grade ore located at greater depth, so-called "skarn" ore, and lower-grade ore located at shallower depth, so-called "porphyry" ore The deeper, skarn ore was

formerly mined in the Bingham District by The Anaconda Company ("Anaconda") using underground mining methods. The shallower porphyry ore is mined in the Bingham District by Kennecott using open-pit or strip mining methods.

10. Removing ore by open-pit methods requires stripping back the sides of the open pit at a relatively shallow angle to remove waste overlying and adjacent to the ore. It is dangerous to construct an open pit mine with steep walls because of the likelihood the walls of the pit will collapse into the open pit. Safely constructing an open pit mine requires the right to strip the surface over an area larger than the area of the ore body to be mined so the wall of the pit can be constructed at a safely shallow angle.

11. On properties located closer to the center of an open pit mine, overburden and waste material are stripped from the surface first, then the underlying ore material is mined after the overburden and waste are removed On properties located toward the periphery of the mine, waste material is stripped from the surface, but no ore material is mined from the properties. Although no ore material is mined from those properties, stripping the waste from those properties provides access to ore contained in properties located closer to the center of the open pit mine. The right to strip waste from the surface of properties, or "stripping rights," thus has value that is separate from the right to mine ore from a property whether the mining is done at the surface or underground. The value of the stripping rights on a particular piece of property depends upon the amount of ore that could not otherwise be mined without the stripping rights, and is independent of the value of whatever ore material may be contained within the particular piece of property.

12. Before 1985, Kennecott controlled mining properties within the Bingham District lying

east of an irregular, approximately north-south boundary line located near the western edge of Kennecott's open-pit Bingham Mine. Anaconda controlled mining properties lying west of the boundary. The ore on Anaconda's properties consisted primarily of skarn ore Anaconda's properties also contained porphyry ore, but not enough for Anaconda to profitably operate its own open-pit mine in the Bingham District. 'New Bingham Mary's Claims were located at the boundary of the Kennecott and Anaconda properties, adjacent to Kennecott's Bingham Mine on one side and adjacent to and part of Anaconda's underground mine on the other side.

13. The location of the Claims adversely affected and complicated Kennecott's operation of its Bingham Mine because it prevented Kennecott from expanding its Bingham Mine to the west. Anaconda and Kennecott had discussions over many years during which the parties attempted to negotiate an agreement by which Kennecott would be able to expand its open pit by stripping across the Claims and other property controlled by Anaconda. One draft agreement was prepared but not signed in 1963. From at least as early as 1963, Kennecott and Anaconda recognized that the stripping rights to the Claims had significant economic value.

14. As of August 18, 1978, Anaconda was the majority and controlling shareholder of New Bingham Mary. At that time, Anaconda owned approximately 86.63% of the issued and outstanding stock of New Bingham Mary.

15. On August 18, 1978, New Bingham Mary sent a letter to its shareholders informing them: "An agreement is now being negotiated between Anaconda and [New Bingham] Mary that will permit Anaconda to conduct under-ground mining operations on the Mary and Commonwealth claims through the facilities of [Anaconda's] Carr Fork mine." The letter also stated: "Also there have been

negotiations between officials of Anaconda, your management and officials of Kennecott to agree on a three-party cross-stripping agreement which would allow Kennecott to expand the boundaries of its Bingham open-pit mine by stripping waste material and low-grade ore material from the surface of property of Anaconda and New Bingham Mary adjacent to the present boundaries of the Bingham pit "

16 Based on the statements of Anaconda, the intent of the proposed lease was to allow Anaconda to mine ore from the Claims by underground mining methods, but was not intended to convey the right to strip waste material from the surface of the Claims for the purpose of obtaining access to ore on adjacent property

17 As of April 30, 1979, Anaconda caused New Bingham Mary to enter into a mining lease ("Lease") with Anaconda under which Anaconda was permitted to perform underground mining operations on the Claims through facilities at Anaconda's underground Carr Fork Mine At the time the Lease was entered into, Anaconda was the majority and controlling shareholder of New Bingham Mary and owned approximately 86 6% of the issued and outstanding stock of New Bingham Mary The Lease provided the New Bingham Mary would receive from Anaconda minimum annual royalties of $25,000 per year to be credited against a three percent net smelter return production royalty

18 The royalties payable to New Bingham Mary under the Lease were reasonable for the type of mining Anaconda intended to perform on the Claims, i e , underground mining There is no evidence that New Bingham Mary ever received payment for or consideration for the stripping rights to the Claims, which had separate value.

19 At no time did Anaconda ever express the intent that the Lease was intended to

include the right to strip overburden or waste from the Claims or to mine the surface of the Claims

20 Pursuant to the Lease, Anaconda mined ore from the Claims through facilities at Anaconda's underground Carr Fork Mine from August 1979 to November 1981 The Board of Directors of New Bingham Mary declared dividends on two occasions, once in 1982 and once in 1985 Defendants received and accepted their share of the dividends knowing they represented royalties paid by Anaconda to New Bingham Mary in connection with Anaconda's activities under the 1979 Lease At no time did Anaconda conduct any surface mining activities on the Claims or strip any waste or overburden from the surface of the Claims Anaconda never performed any open-pit or surface mining in the Bingham District

21 Effective September 12, 1985, Kennecott purchased Anaconda's assets located in and around the Oquirrh Mountains, Utah, including Anaconda's shares of New Bingham Mary stock

22 Following Kennecott's purchase of Anaconda's assets, Kennecott was at all times New Bingham Mary's majority and controlling shareholder and controlled all aspects of New Bingham Mary's governance, assets and affairs From the time Kennecott purchased Anaconda's assets until the Merger, all of New Bingham Mary's officers and directors were officers, directors, or employees of Kennecott As such, a conflict of interest existed between Kennecott and its designated officers, directors and employees whom it caused to be elected as New Bingham Mary's officers and directors (on the one hand), and New Bingham Mary and New Bingham Mary's minority shareholders (on the other hand) with respect to dealings in which the interests of Kennecott were adverse to the interests of New Bingham Mary and New Bingham Mary's minority shareholders.

23 The Lease provides in part that, subject to certain exceptions not relevant here,

"Anaconda, or its successors, shall not assign this Mining Lease or any interest therein, and shall not sublet the Property or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person to occupy or use the Property or any portion thereof without the prior written consent of Lessor, provided that such consent shall not be unreasonably withheld Any such assignment or subletting without such consent shall be void and shall, at the option of Lessor, terminate this Mining Lease "

24 The Lease does not discuss the right to strip the surface of the Claims The terms of the Lease include the right to mine ore on the surface of the Claims (which necessarily involves the right to strip the surface to reach ore on the Claims), but do not grant a right to remove or strip overburden or waste from the Claims for the purpose of mining ore on adjacent property

25 Anaconda's interest under the Lease was purportedly assigned to Kennecott on November 2, 1987. No written consent to the assignment was obtained prior to the assignment Pursuant to the terms of the Lease, the assignment was void, and New Bingham Mary had the right thereafter to terminate the Lease Kennecott thereafter recognized that the Lease provided that the purported assignment was void and that New Bingham Mary had the right thereafter to terminate the Lease, but Kennecott did not in fact cause New Bingham Mary to terminate the Lease Kennecott did not ever disclose to New Bingham Mary's minority shareholders that the assignment was void and that New Bingham Mary had the right to terminate the Lease. Rather, Kennecott subsequently caused New Bingham Mary to provide New Bingham Mary's written consent to assignment of Anaconda's interest under the Lease to Kennecott on March 17, 1988.

26 To ensure that New Bingham Mary and its minority shareholders received fair value

for the right to strip the surface of the Claims, independent officers and directors of New Bingham Mary, acting in the best interests of New Bingham Mary and its minority shareholders, would have terminated the Lease after New Bingham Mary's written consent was not obtained prior to assignment to Kennecott of Anaconda's interest under the Lease

27 At the time Kennecott caused New Bingham Mary to provide written consent to the assignment, Kennecott and New Bingham Mary's officers and directors knew the value of the right to strip the surface of the Claims and knew the Claims were in a critical location with respect to westward expansion of the Bingham Mine

28 Neither Kennecott nor New Bingham Mary's officers or directors informed New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before Anaconda's interest in the Lease was assigned to Kennecott, that assignment of the Lease was void, and New Bingham Mary had, but did not exercise, the right to terminate the Lease Defendants did not have notice prior to this litigation that New Bingham Mary's prior written consent was not obtained before the lessee's interest in the Lease was assigned to Kennecott, the assignment was void, and New Bingham Mary had, but failed to exercise, the right to terminate the Lease

29 Without ever describing its interpretation to the minority shareholders, Kennecott internally viewed the Lease and the assignment to include unlimited stripping rights to the Claims

30 Kennecott began stripping waste from the surface of the Claims as part of its expansion of its Bingham Mine during 1989 and continued stripping waste from the Claims thereafter

31 Kennecott and New Bingham Mary's officers and directors knew Kennecott had begun stripping the surface of the Claims, but did not disclose to New Bingham Mary's minority

shareholders that Kennecott was stripping waste from the surface of the Claims as part of an expansion of the Bingham Mine At a 1992 annual meeting of New Bingham Mary's shareholders, a director of New Bingham Mary who was also an officer and employee of Kennecott concealed the fact Kennecott had begun stripping the Claims and informed minority shareholders the Claims were located "above and around" the Bingham Mine At the time of the 1992 shareholder meeting, Kennecott had been stripping the surface of the Claims for three years, therefore the Claims were located within the Bingham Mine

32 Kennecott conducted stripping activities on the Claims for approximately six years before mining ore from either of the Claims Kennecott began removing ore by surface mining from one of the Claims as part of its operation of the Bingham Mine during 1995 and continued to remove ore from that Claim in 1996 Kennecott never removed ore from the other Claim The predominant purpose of Kennecott's stripping activities on the Claims was to enable Kennecott to access ore on property adjacent to the Claims

33. The minority shareholders, including Defendants, did not have notice that Kennecott had begun stripping the surface of the Claims and removing ore from the Claims before the Special Meeting of Shareholders of New Bingham Mary held November 12, 1997, at which shareholders were invited to vote for or against the Merger.

34 Had the Lease been terminated, New Bingham Mary would have been entitled to negotiate a new lease on the Claims as of 1987. An arm's-length negotiation would have resulted in fair and reasonable compensation to New Bingham Mary for the value of stripping rights, the value of shallower, porphyry that can be mined using open-pit methods, and the value of deeper, skarn ore

that can be mined using underground mining methods

35 Kennecott, as the majority and controlling shareholder of New Bingham Mary, and the officers and directors of New Bingham Mary caused the affairs of New Bingham Mary to be operated in a way that was to Kennecott's benefit and to the detriment of New Bingham Mary and New Bingham Mary's minority shareholders Kennecott and the officers and directors of New Bingham Mary

a Failed to inform New Bingham Mary's minority shareholders of the value of New Bingham Mary's assets, including the stripping rights held by New Bingham Mary,

b Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to consenting to the assignment of the lessee's interest in the Lease to Kennecott,

c Failed to terminate the Lease when New Bingham Mary's prior written consent was not obtained before the assignment of the lessee's interest in the Lease to Kennecott,

d Failed to inform New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before the purported assignment of the lessee's interest in the Lease to Kennecott, that the assignment of the Lease was void, and that New Bingham Mary had, but did not exercise, the right to terminate the Lease,

e Failed to object to Kennecott stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter because the assignment was void and the Lease

should have been terminated,

f Concealed from New Bingham Mary's minority shareholders that Kennecott had begun stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter,

g Failed to object to Kennecott removing ore from the Claims beginning in 1995 and continuing through 1996 because the assignment was void and the Lease should have been terminated,

h Failed to inform New Bingham Mary's minority shareholders Kennecott had begun stripping waste from the surface of the Claims during 1989 and continued to do so, and had begun removing ore from the claims during 1995 and continued to do so through 1996,

i Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to Kennecott's continuing and ongoing stripping of waste from the surface of, and mining ore from the surface of, the Claims,

j Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the valuation of New Bingham Mary's assets and Shares for purposes of the Merger, and

k Failed to seek or obtain an impartial and independent appraisal of New Bingham Mary's assets and Shares based on independent information and all elements of

value of New Bingham Mary's assets, including the deeper, skarn ore located within the Claims and the right to strip the surface of the Claims

36 The foregoing acts and failures by Kennecott and New Bingham Mary's officers and directors constitute breaches of their respective fiduciary duties to New Bingham Mary and its minority shareholders to maximize the value of New Bingham Mary and New Bingham Mary's assets for all shareholders, and the duty to act in a fair and responsible manner with respect to New Bingham Mary and its minority shareholders Kennecott's and New Bingham Mary's officers' and directors breaches of their fiduciary duties were continuing and ongoing until the Merger

37 Prior to this litigation, the minority shareholders, including Defendants, were not informed by Kennecott or New Bingham Mary's officers or directors, did not know, did not have notice of, and had not discovered the value of New Bingham Mary's assets, including the stripping rights, that New Bingham Mary had not given its prior written consent to the assignment, that the assignment was void, that New Bingham Mary had—but did not exercise—the right to terminate the Lease, that Kennecott had begun removing and continued to remove waste from the Claims, that Kennecott had begun mining and continued to mine ore from the Claims, that New Bingham Mary's officers and directors did not seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the value of the Claims, the assignment, Kennecott's stripping and mining activities on the Claims, or the Merger

38 Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, in the exercise of reasonable care, should have

discovered, prior to this lawsuit, the breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, lacked diligence or delayed unreasonably in asserting claims for breaches of fiduciary duties, and has not shown by a preponderance of the evidence it was prejudiced by any such delay or lack of diligence Nor has Plaintiff shown by a preponderance of the evidence that by asserting the claims for breaches of fiduciary duties, Defendants are taking a position inconsistent with any prior act, statement, or admission by Defendants or other minority shareholder of New Bingham Mary Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, discovered, or in the exercise of reasonable care should have discovered, prior to this lawsuit, grounds for objecting to acts and omissions by Kennecott or New Bingham Mary's officers or directors constituting breaches of their respective fiduciary duties

39 The foregoing breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors caused New Bingham Mary and its minority shareholders to receive less than fair value for the assets of New Bingham Mary

40 The assets of New Bingham Mary at the time of the Merger included New Bingham Mary's claims for breaches of fiduciary duty against its officers, directors, and majority and controlling shareholder, Kennecott The value of such claims must be included in the fair value of the Shares as of the date of the Merger, and is at least equal to the value of the assets given up by the management of New Bingham Mary to Kennecott in transactions between New Bingham Mary and Kennecott that were not at arm's length That value is at least equal to the reasonable compensation

New Bingham Mary would have obtained for the stripping rights to the Claims and other assets in a transaction negotiated on an arm's length basis

41 In the alternative, the value of the Shares at the time of the Merger included all the value of the Claims unencumbered by the Lease, which Lease should be disregarded as properly terminable as of 1987 That value is likewise at least equal to the reasonable compensation New Bingham Mary would have obtained for the stripping rights to the Claims and other assets in a transaction negotiated on an arm's length basis

42 The appraisal of New Bingham Mary by Gerald P Halmbacher presented by Plaintiff at trial was not independent and was based on information provided by Kennecott that could only lead to a determination that was unfairly favorable to Kennecott and the Plaintiff and unfavorable to the minority shareholders Plaintiff's appraisal does not reflect the fair value of New Bingham Mary's assets or the Shares

43 The expertise and qualifications of Defendants' expert witnesses, Bernard J Guarnera and Donald P Bellum, in evaluating the technical and appraisal matters about which each testified is unquestionable by reason of their respective skills, backgrounds, education, and experience in the mining industry, appraising mining properties, managing and operating mining companies and mining operations, and negotiating acquisitions and sales of mining properties The Court finds their testimony and expert opinions were based on thorough analysis of all of the factors relevant to the analyses they performed and correctly applied those factors to the income and market approaches they used to value the assets of New Bingham Mary The Court finds the testimony of Mr Guarnera and Mr Bellum was reliable, helpful, and persuasive in determining the fair value of the Claims and

the Shares

44 The Court adopts the appraisals and methodology of Mr Guarnera and Mr Bellum with respect to the fair value of the Claims and the Shares as follows

a The Court adopts the Defendants' experts' opinions concerning the technical and economic factors relevant to determining the fair value of New Bingham Mary's assets as of December 31, 1997, including commodity prices, discount rates, and tax basis The Court finds those opinions are based on reliable data correctly applied to appropriate valuation and appraisal methods

b The Court adopts the Defendants' experts' opinion that a five percent net smelter returns royalty rate reflects the fair royalty rate reflective of the market at all relevant times that results in fair value being given for the ore located within the Claims From 1987 and thereafter, parties negotiating at arm's length, acting in their own respective best interests, would negotiate a five percent net smelter return royalty rate for the ore located within the Claims

c Based on a five percent net smelter return royalty rate, the net present value of the shallower, porphyry ore located within the Claims is $2,385,745 ($1,368,605 net present value of royalties at 3% royalty rate contained in the report of Defendants' experts times 5/3 = $2,281,008 plus $104,737 net present terminal value of Lease = $2,385,745) as of December 31, 1997

d The Court adopts the Defendants' experts' opinion that the fair value of the Shares of New Bingham Mary includes additional value for the deeper, skarn ore located

within the Claims The Court finds that known skarn mineralization lies within the Claims and that a prudent person would ascribe a value of $13 3 million to the known skarn mineralization located within the Claims Based on the royalty rate of five percent, $665,000 of that amount ($13 3 million times 0 05 = $665,000) is ascribed to the value of New Bingham Mary as of December 31, 1997

e One method of determining the fair value of the right to strip the surface of the Claims is to determine what portion of the net cash flow (derived from the value of ore made available by having the right to strip the surface of the Claims) a prudent buyer acting in its own best interests would pay and a prudent seller acting in its own best interests would accept in exchange for the stripping rights

f The right to strip the surface of the Claims controlled access to ore reasonably projected by the income method of valuation to generate more than $3 billion in gross revenues and more than $762 million in net cash flows with a net present value of more than $238 million as of December 31, 1997

g The Court finds a prudent buyer acting in its own best interests would pay, and a prudent seller acting in its own best interests would accept, fifteen percent of the net present value of $238 million, or $35,700,000

h Alternatively, the fair value of the right to strip the surface of the Claims may be determined by the royalty rate a prudent buyer would pay and a prudent seller would accept on ore made available by having the right to strip the surface of the Claims The Court finds a prudent buyer would pay, and a prudent seller would accept, a net smelter returns

royalty of two percent on the ore made available by having the right to strip the surface of the Claims A two percent net smelter return royalty on all ore made available by obtaining the right to strip the surface of the Claims would generate income for New Bingham Mary with a net present value of $30,534,341 as of December 31, 1997 Forty percent of the net present value of royalties derived from ore located within the Claims (2%/5%) is subtracted from this number to avoid double counting royalties derived from ore located within the Claims Thus, the net present value of the stripping rights based on royalties is $29,580,043 ($30,534,341 minus forty percent of $2,385,745 = $29,580,043) as of December 31, 1997

i The Court finds both methods of valuing the stripping rights valid and relevant, and adopts the average of the two methods, $32,640,000 or $33 61 per Share of New Bingham Mary, as the fair value of the stripping rights as of December 31, 1997 The value of the stripping rights is in addition to and independent of the value of the ore located within the Claims

j The Court finds New Bingham Mary held $348,900 in cash assets as of December 31, 1997, all of which is included in the value of New Bingham Mary

45 In summary, the Court finds the value of New Bingham Mary as of December 31, 1997, is as follows

	Net Value	Value per Share[1]
Cash	$348,900	$0 36
Value of deep skarn mineralization located within the Claims	$665,000	$0 68
Value of shallow porphyry mineralization located within the Claims	$2,385,745	$2 46
Value of stripping rights	$32,640,000	$33 61
Total fair value of Shares	$36,039,645	$37 11

46 The fair value of the Shares, and the amount that must be paid pursuant to the Merger. is $37 11 per Share The Defendants were already paid on the basis of $1 10 per Share The Additional amount per Share that must be paid to Defendants pursuant to the Merger is $36 01 per Share, the difference between the fair value of the Shares and the amount already paid for the shares ($37 11 per Share – $1 10 per Share = $36 01 per Share)

47 Defendants are entitled to a total award (representing the fair value of all of the Shares as of December 31, 1997) in the amount of $1,325,204 00 ($36 01 per Share times 36,801 Shares = $1,325,204 00) The calculation of prejudgement interest at the legal rate of ten percent per year from February 18, 1998, the date that Defendants were paid on the basis of $1 10 per Share, to January 13, 2004, equals $781,870 36 ($1,325,204 00 times 0 10/year times 5 90 years = $781,870 36) The total amount to which the Defendants are entitled through January 13, 2004,

[1]Value per Share = Net Value divided by 971.200 New Bingham Mary Shares issued and outstanding as of December 31, 2997

equals $2,107,074 36 and is summarized as follows

	Shares	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	14,720	$530,067 20	$312,739 64	$842,806 84
Robert Groesbeck	14,721	$530,103 21	$312,760 89	$842,864 10
Robert R Groesbeck Living Trust	7,360	$265,033 60	$156,369 82	$421,403 42

48 The Court finds in all respects as set forth and implied by the following Conclusions of Law

CONCLUSIONS OF LAW

49 The court concludes in all respects as set forth and implied by the foregoing Findings of Fact

50 Defendants dissented from the Merger and Defendants properly perfected their dissenter's rights Defendants complied with the requirements of Utah Code Ann § 16-10a-1330 et seq and are entitled to an award equal to the fair value of their Shares

51 Extrinsic evidence concerning the intent of the parties to the Lease is admissible to allow the Court to determine whether the Lease is ambiguous and, if so, to interpret the Lease Plaintiff's Objections to Defendants' Trial Exhibits 108, 125, and 128 are therefore overruled, and each of those Exhibits are admitted into evidence In addition, Plaintiff's Motion in Limine to Exclude the Introduction of Evidence to Interpret the 1979 Lease is denied

52 Breaches of fiduciary duty that affect the fair value of New Bingham Mary's assets are relevant to determination of the fair value of the Shares to the extent the statute of limitations on

those breaches has not run Plaintiff's Motion in Limine to Exclude Evidence of Breach of Fiduciary Duty Unrelated to the Merger is therefore denied, and such evidence is admitted into evidence

53 The value of the right to strip the surface of the Claims is relevant to determining the fair value of New Bingham Mary's assets and the Shares Plaintiff's objection to admission of evidence concerning the fair value of the right to strip the surface of the Claims is therefore denied.

54 New Bingham Mary's majority shareholder, officers, and directors owed New Bingham Mary and New Bingham Mary's minority shareholders, including Defendants, fiduciary duties to maximize the value of New Bingham Mary for all shareholders, and the duty to act in a fair and responsible manner with respect to New Bingham Mary and its minority shareholders

55 A conflict of interest existed between New Bingham Mary's majority and controlling shareholder and the controlling shareholder's designated officers and employees whom it caused to be elected as New Bingham Mary's officers and directors (on the one hand), and New Bingham Mary and New Bingham Mary's minority shareholders (on the other hand) with respect to dealings in which the interests of Kennecott were adverse to the interests of New Bingham Mary and New Bingham Mary's minority shareholders Those transactions include consenting to the assignment of Anaconda's interest in the Lease to Kennecott, Kennecott's stripping waste from the surface of the Claims, Kennecott's mining ore from the Claims, determination of the consideration to be paid to New Bingham Mary's minority shareholders pursuant to the Merger, and keeping New Bingham Mary's minority shareholders informed of New Bingham Mary's dealings with Kennecott The actions and omissions of New Bingham Mary's officers and directors with respect to New Bingham Mary's dealings with Kennecott are not protected by the business judgment rule but instead are

judged by the Court on the basis of their fairness to New Bingham Mary and the minority shareholders

56 New Bingham Mary's majority shareholder, officers, and directors breached their fiduciary duties to New Bingham Mary and New Bingham Mary's minority shareholders, including Defendants, by:

a. Failing to inform New Bingham Mary's minority shareholders of the value of New Bingham Mary's assets, including the stripping rights held by New Bingham Mary;

b. Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent and disinterested directors, or independent and disinterested legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to consenting to the assignment of the lessee's interest in the Lease to Kennecott;

c. Failing to terminate the Lease when New Bingham Mary's prior written consent was not obtained before the assignment of the lessee's interest in the Lease to Kennecott;

d. Failing to inform New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before the purported assignment of the lessee's interest in the Lease to Kennecott, that the assignment was void, and that New Bingham Mary had, but failed to exercise, the right to terminate the Lease;

e. Failing to object to Kennecott stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter because the assignment was void and the Lease

should have been terminated,

f Concealing from New Bingham Mary's minority shareholders that Kennecott had begun stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter,

g Failing to object to Kennecott removing ore from the Claims beginning in 1995 and continuing through 1996 because the assignment was void and the Lease should have been terminated,

h Failing to inform New Bingham Mary's minority shareholders Kennecott had begun stripping waste from the surface of the Claims during 1989 and continued to do so, and had begun removing ore from the claims during 1995 and continued to do so through 1996

i Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to Kennecott's continuing and ongoing stripping of waste from the surface of, and mining ore from the surface of, the Claims,

j Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the valuation of New Bingham Mary's assets and Shares for purposes of the Merger, and

k Failing to seek or obtain an impartial and independent appraisal of New Bingham Mary's assets and Shares based on independent information and all elements of

Bingham Mary's minority shareholders, including Defendants, discovered, or in the exercise of reasonable care should have discovered, prior to this lawsuit, grounds for objecting to acts and omissions by Kennecott or New Bingham Mary's officers or directors constituting breaches of their respective fiduciary duties Plaintiff's affirmative defense with respect to laches and estoppel are denied

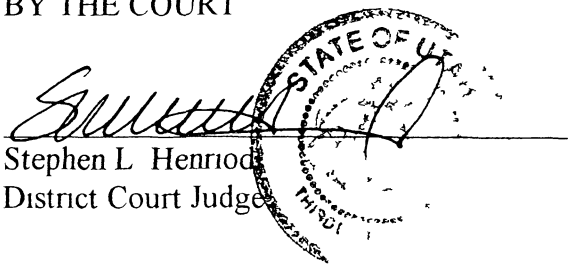
60 Defendants are entitled to judgment in the amount of $1,325,204 00 ($36 01 per Share times 36,801 Shares = $1,325,204 00) In addition, Defendants are entitled to prejudgment interest at the legal rate of ten percent per year from February 18, 1998, the date that Defendants were paid on the basis of $1 10 per Share Interest from February 18, 1998, to January 13, 2004, equals $781,870 36 ($1,325,204 00 times 0 10/year times 5 90 years = $781,870 36) Defendants are therefore entitled to judgment in the amount of $2,107,074 36 as follows

	Shares	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	14,720	$530,067 20	$312,739 64	$842,806 84
Robert Groesbeck	14,721	$530,103 21	$312,760 89	$842,864 10
Robert R Groesbeck Living Trust	7,360	$265,033 60	$156,369 82	$421,403 42

61 In addition, Defendants are entitled to interest at the rate of $3,630 70 per day from January 14, 2004, until the date the Judgment is signed as follows Marilyn Groesbeck Glade, $1,452 24 per day, Robert Groesbeck, $1,452 34 per day, and Robert R Groesbeck Living Trust, $726 12 per day In addition, Each Defendant is entitled to interest at the judgment rate of 3 41 percent per year or as that rate may change from time to time from the date the Judgment is signed

DATED this 15 day of January, 2004

BY THE COURT



Stephen L Henriod
District Court Judge

67616

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2004, I caused a true and correct copy of the foregoing *[Proposed] Findings of Fact and Conclusions of Law* to be served via hand delivery, on the following

John B Wilson
Margaret Niver McGann
PARSONS BEHLE & LATIMER
201 South Main, Suite 1800
Salt Lake City, UT 84145-0898

Wendy L Manning

67616

Tab 5

NOTICE OF MINING LEASE

5583

This Memorandum and Notice of Mining Lease, dated this 30th day of April, 1979, by and between New Bingham-Mary Mining Company, a Utah corporation, hereinafter referred to as "Lessor" and The Anaconda Company, a Delaware corporation, hereinafter referred to as "Anaconda";

W I T N E S S E T H

In consideration of the terms and provisions set forth in that certain Mining Lease dated on even date herewith, hereinafter called the "Mining Lease", between Lessor and Anaconda. Lessor has leased and does hereby lease unto Anaconda, for the purposes therein specified, the following patented mining claims, herein called the "Mining Properties", situated in Salt Lake County, State of Utah:

COMMONWEALTH Lode Lot No. 418, and
MARY Lode, Lot No. 418, both situated in the West Mountain Mining District, County of Salt Lake, State of Utah.

Together with all minerals, water and water rights, rights-of-way, easements, tenements, hereditaments, privileges, appurtenances and appropriations of every kind and nature belonging to Lessor and located on or in the vicinity of or in anywise pertaining to the mining properties.

The primary term of said Mining Lease is 25 years from the date hereof, subject to renewal as provided in Section 2.2 of the Mining Lease. April 30 2004

BOOK 2803 PAGE 1454

Information regarding the terms of said mining lease may be obtained from the President, New Bingham-Mary Mining Company, 555 Seventeenth Street, Denver, Colorado 80217.

It is understood that the Mining Lease constitutes the complete agreement between Lessor and Anaconda with respect to the Mining Properties. This notice of mining lease shall not be deemed to modify any other provisions of the Mining Lease, hereby ratifying and affirming the Mining Lease and all of its terms.

In witness whereof, the parties hereto have executed this Notice of Mining Lease as of the date first above written.

New Bingham-Mary Mining Company

By _____
President

The Anaconda Company

By _____
Vice-President

STATE OF COLORADO)
) ss.
County of Denver)

The foregoing instrument was acknowledged before me on this 30th day of April, 1979, by J. J. O'Brien, President of the New Bingham-Mary Mining Company.

Witness my hand and official seal.

NOTARY PUBLIC

_____
Notary Public
Residing at Denver

My Commission Expires _____

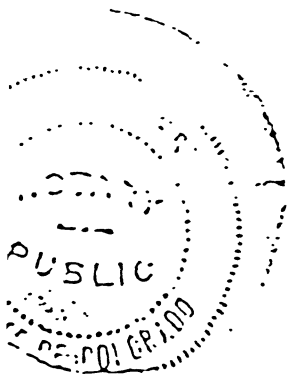
My commission expires September 22, 1981

BOOK 1000 PAGE 473

STATE OF COLORADO)
) ss.
County of Denver)

The foregoing instrument was acknowledged before me on this 30th day of April, 1979, by Archie J. MacDonell, Vice-President of The Anaconda Company.

Witness my hand and official seal.



Notary Public
Residing at Denver

My Commission Expires

My Commission expires September 22, 1981

MINING LEASE

NEW BINGHAM-MARY MINING COMPANY, Lessor

THE ANACONDA COMPANY, Lessee

MINING LEASE

THIS MINING LEASE dated the 30th day of August, 1979, between NEW BINGHAM-MARY MINING COMPANY, a Utah corporation, hereinafter referred to as "Lessor", and THE ANACONDA COMPANY, a Delaware corporation, hereinafter referred to as "Anaconda";

WITNESSETH:

In consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration paid by Anaconda to Lessor, and in consideration of the covenants and agreements hereinafter set forth, the parties agree as follows:

I. GRANT OF LEASE

1.1 Lessor hereby demises and leases unto Anaconda those patented mining claims situated in the West Mountain Mining District, Salt Lake County, Utah, which are more particularly described as the Mary Lode, Lot No. 415, and the Commonwealth Lode, Lot No. 418, together with all minerals, dumps, improvements, fixtures and equipment, water and water rights, and other privileges and appurtenances belonging to or situated upon such claims. All such lands, fixtures, equipment and interests in such lands are referred to herein as the "Property".

II. TERM OF LEASE

2.1 The primary term of the Lease hereunder is a

period of twenty-five (25) years, commencing on the date hereof and ending on the anniversary date twenty-five (25) years later unless sooner terminated or extended as herein provided.

2.2 Anaconda is hereby granted the option to extend this Mining Lease for five successive ten (10) year extensions by giving written notice to Lessor at least six (6) months prior to the end of the primary or any extended lease term.

III. RIGHTS GRANTED

3.1 Lessor hereby grants to Anaconda during the term hereof the exclusive right, subject to the terms hereof:

(a) to enter upon, explore, examine and investigate the Property, to carry on geological and geophysical work with respect thereto, and to delineate ore occurrences, and to secure cores and samples from the Property;

(b) to develop, extract, take, mine, save and sell minerals from the Property, and to engage in related operations with respect to all veins, lodes and mineral deposits contained in or on the Property, to construct and maintain on the Property all works and buildings and other structures, machinery and facilities necessary for such mining and related operations;

(c) to the extent Lessor has such rights, to have free access to and from all areas of the Property, and to use Lessor's fixtures and equipment located on the Property as of the effective date of this Mining Lease; and

(d) to possess, occupy and use, in the course of and pertinent to its operations upon or within the Property, any presently

existing shaft, tunnel, drift, winze, adit or other mine workings, owned by Lessor and situated on the Property.

IV. MINIMUM ROYALTY AND ROYALTIES RESERVED

4.1 Anaconda shall pay to Lessor Five Thousand Dollars ($5,000) upon execution of this Mining Lease and a minimum advance annual royalty of Twenty-Five Thousand Dollars ($25,000) payable within ten days after approval of this Mining Lease by the stockholders of Lessor, which will be the effective date of this Mining Lease, and on each anniversary of the effective date for the remaining period during which this Lease is in effect. These minimum advance royalty payments shall be a credit against production royalties in excess of said advance minimum royalty payments that accrue in accordance with the royalty schedule set forth herein.

4.2 Lessor reserves a royalty of Three Percent (3%) of Net Returns, as hereinafter defined, on all minerals and products removed from the Property.

4.3 The term "Net Returns" when used herein shall mean the total purchase price payable by the purchaser which purchases from Anaconda (including purchases by other divisions of The Anaconda Company) ore mined from the Property, concentrate, metal, metal products or other salable products produced therefrom, after deducting therefrom all costs and charges incurred by Anaconda prior to the sale (excepting,

however, the direct costs of mining and concentrating said ores), including, without limitation, smelter treatment charges, penalties, sampling and assaying charges paid by Anaconda or deducted by the purchaser with relation to said ore or concentrates, and all haulage charges incurred by Anaconda from the concentrator to the point of delivery to the purchaser of the product so sold, or freight and haulage charges from the Property to a purchaser of direct smelting ore, and costs and charges for refining of the salable product.

4.4 Royalties payable to Lessor on Net Returns received by Anaconda shall be paid by Anaconda within 30 days following the close of each calendar quarter. Each royalty payment shall be accompanied by copies of the assay reports and settlement sheets or other appropriate records of Net Returns received by Anaconda from the purchaser of such ore, concentrate, metal, metal product or other salable product with relation to all production to which such royalty payment relates.

4.5 In the event that the smelter treatment charges, penalties, sampling and assaying charges, and rail freight or other haulage charges, and refining charges deductible with relation to a particular lot of ore or concentrate or products produced therefrom should exceed

the purchase price payable by the purchaser with relation to said lot of ore, Anaconda shall pay the amount of said deficiency and shall not be entitled to deduct the amount so paid from Net Returns applicable to any other lot of ore or concentrate sold.

4.6 In the event the smelter or other reduction works to which the ores, minerals, concentrates, and other products are delivered or the refining facilities are owned or operated by Anaconda, and/or in the event Anaconda owns or operates the means for transportation from the point of loading to the smelter, reduction works, or refinery facilities, Anaconda agrees that its charges shall be its actual cost of operating such facility.

4.7 Lessor is hereby granted a security interest in all ores extracted from the Property and concentrates produced therefrom, including proceeds from the sale thereof, during the term of this Mining Lease or any extension thereof, to secure to Lessor any and all sums owing to Lessor by Anaconda arising from operations under this Mining Lease, provided, however, that Lessor agrees to permit such security interest to be subordinated to a lien of a lending institution which provides funds to Anaconda.

V. MINING OPERATIONS

5.1 Anaconda shall conduct all exploration,

development, mining, reclamation and other operations under this Mining Lease in accordance with good mining practices and in accordance with sound principles of conservation, and all applicable laws, rules and regulations, including but not restricted to all applicable safety laws and environmental laws and regulations of the United States and the State of Utah.

5.2 Anaconda shall have the right to commingle ore mined from the Property with ore mined from other properties provided that Anaconda shall establish a system for establishing the amount and grade of ore from the Property which is being commingled, and resulting tons of concentrates, pounds of copper and ounces of silver and gold recovered from the concentrate, and provided that Lessor shall have the right to consent to and monitor the use of such system.

5.3 Anaconda agrees that it will assume and discharge all liability, claims and demands whatsoever arising out of or based upon or in connection with operations of Anaconda upon the Property. Anaconda further agrees to indemnify, defend and save Lessor and the Property harmless from and against any and all claims, demands or causes of action made by any person, firm or corporation on account of any debts, expenses or other claims incurred by Anaconda, its agents or employees.

VI. INSURANCE AND INDEMNITY

6.1 Anaconda shall comply with all state and federal social security and unemployment insurance laws. Before commencing activities on the Property, Anaconda shall be qualified under Workmen's Compensation Law of the State of Utah and shall at all times comply therewith.

6.2 Anaconda agrees to and does hereby indemnify Lessor and save Lessor harmless against and from:

> (a) Any and all claims and liabilities, including costs and expenses, for bodily injury to, or death of, persons (including claims and liabilities for care or loss of services in connection with any bodily injury or death);
>
> (b) Any and all claims and liabilities, including costs and expenses, for loss or destruction of or damage to any property belonging to Anaconda or others (including claims or liabilities for loss of use of any property); and
>
> (c) Loss (including loss of use) or destruction of or damage to (i) material, supplies, equipment and other property necessary for the work, or (ii) any property of Lessor;

resulting directly or indirectly from, or occurring in the course of the activities of Anaconda, its employees, agents, contractors or invitees, provided, however, that such indemnity in connection with this Mining Lease shall not extend to (i) claims and liabilities for injury or death to persons who are not employees of Anaconda, its agents or contractors, resulting from Lessor's sole negligence or

willful misconduct, or (ii) loss, destruction or damage (including claims and liabilities therefor) resulting from Lessor's sole negligence or willful misconduct.

6.3 Anaconda will include the provisions of Paragraphs 6.1 and 6.2 in any operating agreement or subcontract authorized by Article XV, and will require any parties working on or occupying the Property to comply with the provisions of this Article. Such inclusion shall not, however, relieve Anaconda from liability pursuant to said paragraph.

VII. TITLE AND ACQUISITIONS

7.1 This Mining Lease shall relate only to such interest as Lessor has in the Property. Lessor makes no warranties or representations, either expressed or implied, as to the condition of the Property, the quality, quantity or extent of ore, if any, thereon, the existence, adequacy or condition of machinery or equipment, or the sufficiency or extent of the rights or titles of Lessor with relation to the Property. Under no circumstances shall Lessor be obligated or liable to Anaconda in the event that Anaconda is divested of any rights to the Property or any portion of the Property by persons claiming an interest therein, nor shall Lessor have any obligation to defend any action contesting the rights of Lessor or Anaconda to the Property.

7.2 Should Lessor hereafter acquire title or cure defects, if any, in the title to any of the Property existing at the time of the execution of this Mining Lease, such later acquired title shall become subject to this Mining Lease.

7.3 Anaconda will pay Lessor the royalty set out in Paragraph 4.2 on all ore located within the vertical extension of the boundary of the Property, even though the apex of any lode, ledge, or vein of ore so situated may be located within the boundaries of property owned by Anaconda. Lessor waives all rights to any ore which is situated on the Anaconda side of the vertical extension of the common boundary between Anaconda-owned properties and the Property, even though the apex of any lode, ledge or vein of ore so situated may be located within the boundaries of the Property.

VIII. WATER RESOURCES

8.1 Anaconda may use, in its operations under this Mining Lease, all water available from the Property after prior appropriations and existing contractual obligations, if any, have been satisfied.

IX. DEFAULT AND CANCELLATION

9.1 This Mining Lease shall, at the option of Lessor, cease and terminate at the happening of any of the events specified in Paragraphs (a) through (h) of this Article, and Lessor may thereupon recover possession of the

Property, provided that written notice of intent to terminate is given to Anaconda at least 90 days prior to the effective date of such termination, and all rights of Anaconda under this Mining Lease shall be deemed canceled and terminated.

(a) If Anaconda makes an assignment for the benefit of its creditors; or

(b) If a decree, mandate or other order by a court having jurisdiction is entered adjudging Anaconda a bankrupt or insolvent, and such decree, mandate or other order continues undischarged or unstayed for a period of ninety (90) days; or

(c) If a decree, mandate or other order of a court having jurisdiction for the appointment of a receiver, liquidator, trustee or an assignee in bankruptcy or insolvency of Anaconda or if all or substantially all of Anaconda's property is entered, and such decree, mandate or other order remains in force undischarged and unstayed for a period of ninety (90) days; or

(d) If Anaconda institutes proceedings for a decree, mandate or other order of any kind mentioned in the applicable provisions of the foregoing Paragraphs (b) or (c), or in any such proceedings not instituted by Anaconda, files a consent to any such decree or order; or

(e) If Anaconda admits in writing its inability to pay its debts generally as they become due; or

(f) If the interest of Anaconda in the Property is sold under execution or other legal process; or

(g) If Anaconda fails to pay part or all of the rentals or royalties set forth herein

when due, and such failure continues for thirty (30) days after written notice thereof from Lessor; or

(h) If Anaconda fails to perform or observe any other covenant, agreement or requirement of this Mining Lease, and any such failure continues for thirty (30) days after written notice from Lessor specifying the nature and extent of any such default, unless such default is reasonably incurable within thirty (30) days (in which event Anaconda shall have commenced the curing of such default and shall thereafter proceed with all due diligence to complete the curing of such default).

X. TERMINATION

10.1 Anaconda may, at any time after one year from the date hereof, terminate this Mining Lease provided that written notice of intent to terminate is given Lessor at least 90 days prior to the effective date of such termination.

10.2 On termination, all structures and mining improvements built or made by Anaconda on the Property shall be and become the property of Lessor.

10.3 In the event of termination of this Mining Lease pursuant to Paragraph 10.1 hereof, Anaconda shall deliver to Lessor prior to the effective date of said termination a written release and quitclaim deed releasing all of the rights granted to and acquired by Anaconda under this Mining Lease and quitclaiming to Lessor all of the rights, titles and interests of Anaconda in and to the Property.

10.4 Termination of this Mining Lease, whether pursuant to this Article X or otherwise, shall not be deemed to terminate any obligations of Anaconda hereunder which have accrued prior to the date of such termination, nor shall it terminate the obligation of Anaconda to make royalty payments with relation to all ore mined from the Property, or concentrates produced therefrom, which have been removed from the Property prior to the effective date of such termination. All payments made by Anaconda to Lessor prior to the date of termination shall be retained by Lessor as compensation for rental and use of the Property and as the consideration for which the Mining Lease herein is given.

10.5 In the event of termination of the Mining Lease herein, for any reason whatsoever, Anaconda agrees that it will voluntarily surrender the Property and all mine workings thereon to Lessor. In the event of such termination, Anaconda shall not be entitled to remove from the Property any timbering, roof support or other materials necessary to the physical support of the mine workings or the Property. Except as aforesaid, Anaconda shall have the right at any time during a period of 120 days following the termination of this Mining Lease to remove from the Property all tools, equipment, machinery, supplies and other personal property which have been placed on the Property by Anaconda

and which have not become affixed to the soil. Any such tools, equipment, machinery, supplies and personal property which shall remain on the Property following the expiration of said 120 day period shall be deemed to have been abandoned by Anaconda and shall be and become the property of Lessor.

10.6 All broken ores on the surface or underground not shipped prior to termination may be removed by Anaconda within 120 days after termination and accounted for, as provided in this Mining Lease, as if shipped prior to termination. If not so removed within 120 days, such ores shall become the Property of Lessor.

XI. TAXES

11.1 Anaconda will pay all ad valorem, severance, occupation or franchise taxes hereafter levied against the Property, or levied for the privilege of conducting mining operations thereon; except, however, where ad valorem taxes are based upon net annual proceeds of production, the obligation to pay such taxes shall be divided between Anaconda and Lessor in direct proportion to the percentage of average Net Returns received by each. Anaconda will pay taxes levied or assessed hereafter upon all machinery, equipment, and other personal property and improvements in existence upon the Property. Anaconda further agrees that in the event that following termination of this Mining Lease

any taxes are levied or assessed against the Property or Lessor, which taxes result from or are attributable to the production and/or sale by Anaconda of ore mined from the Property or concentrates produced therefrom, Anaconda will make payment of said taxes when due. Anaconda agrees that it will deliver to Lessor the original or duplicate copies of receipts evidencing payment of all such taxes by Anaconda.

XII. FORCE MAJEURE

12.1 All obligations of Anaconda under this Mining Lease, with the exception of the obligation to pay royalties and taxes and to protect Lessor and the Property from liens and damages, shall be suspended while, but only so long as and to the extent that, Anaconda is prevented from complying with such obligations in whole or in part by strikes, lockouts, acts of God, unavoidable accidents, uncontrollable delays in transportation, and any state or federal laws, regulations or orders, or other matters beyond the reasonable control of Anaconda whether similar to the matters specified, or otherwise. Anaconda shall not be required against its will to adjust any labor dispute or question the validity of or refrain from judicially testing any federal or state law, order, regulation or rule.

XIII. INSPECTION

13.1 Lessor and its agents and representatives may

at all reasonable times enter upon the Property to ascertain whether Anaconda is complying with the terms and conditions of this Mining Lease. Lessor assumes all liability for its personnel, agents and representatives while they are on the Property.

13.2 Lessor may map the geology and survey the mine workings and take such samples as it may desire on the tracts owned by it, provided that such actions of Lessor shall not interfere with Anaconda's mining activities.

XIV. RECORDS AND REPORTS

14.1 Anaconda will keep accurate records, maps, and books of account in accordance with Article IV and usual accounting practices covering all of its operations under this Mining Lease. Such records, maps and books of account relating to ore production, tonnage and income from sale of ore and related products, shall be open for inspection of Lessor or its agents at any reasonable time. Lessor may arrange for an independent audit of all records and books of the income account at Lessor's expense to verify the accuracy of Anaconda's accounting.

14.2 Anaconda shall keep up-to-date engineering survey records and maps of all surface and underground working places including, but not limited to, shafts, drifts, crosscuts, laterals, raises, winzes and stopes. Such

records and maps shall be open for inspection of Lessor or its agents at any reasonable time.

14.3 Anaconda will furnish Lessor quarterly progress and production reports, with maps showing the character and amount of work performed, including footage advance in all headings, concentration of ore by Anaconda during the preceding quarter, and the place or places where work was performed, and shall, if available, make available for Lessor's inspection all sample rejects, drill core and cuttings, sample data and metallurgical accounts, drill logs, and assays, geological and engineering maps in order that Lessor may be kept currently informed as to the character and amount of work performed. All drill hole cores must be preserved. Lessor reserves the right to make copies of all sample data, metallurgical accounts, drill logs, assays, engineering data, and geological data for Lessor's permanent record.

XV. ASSIGNMENT, OPERATION AGREEMENTS AND SUBCONTRACTS

15.1 Except as provided below, Anaconda, or its successors, shall not assign this Mining Lease or any interest therein, and shall not sublet the Property or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person to occupy or use the Property or any portion thereof without the prior written consent of Lessor, provided that such consent by Lessor shall not be

unreasonably withheld. Any such assignment or subletting without such consent shall be void and shall, at the option of Lessor, terminate this Mining Lease. Anaconda may sublease the Property or assign this Mining Lease to a joint venture partnership in which Anaconda is a general partner, and continuing only so long as Anaconda is a general partner, provided, however, that no such assignment or sublease shall relieve Anaconda of its obligations or liabilities hereunder. The provisions of this paragraph shall not apply to any transfers from Anaconda to any wholly-owned subsidiary or to any parent company of Anaconda, provided, however, that no such transfer shall relieve Anaconda of its obligations or liabilities hereunder.

15.2 Trust deeds, trust indentures, mortgages, security agreements or other instruments executed for security involving the Property are transfers within the meaning of Paragraph 15.1 and shall require the approval of Lessor.

15.3 Anaconda may enter into an agreement or agreements not inconsistent with the terms of this Mining Lease with substantial and reliable operating companies or individuals for the performance of the work to be done on the Property. In any such agreement or agreements, Anaconda shall include an insurance and indemnity provision identical to that contained in Article VI of this Mining Lease, and

all such companies or individuals will be required to comply with the terms and conditions thereof and hereof.

XVI. POSTING, PROTECTION AGAINST LIENS AND ANACONDA AS AN INDEPENDENT CONTRACTOR

16.1 Anaconda shall post and keep posted on the Property such notices as may be necessary to adequately notify all persons who come upon the Property that it is held by Anaconda under lease from Lessor, and that Anaconda is liable for due compensation of all labor employed and the cost of all supplies and materials purchased and used by Anaconda in and upon the Property, and that Anaconda, not Lessor, is responsible for any debts and expenses incurred by Anaconda in mining operations within the Property.

16.2 Anaconda shall pay for all labor, power, tools, equipment, powder, timber and other materials and supplies used by Anaconda in the prosecution of work under this Mining Lease, and shall not allow any claim or lien for any such thing to be made or asserted against the Property or against Lessor.

16.3 All operations of Anaconda and its employees or agents under this Mining Lease shall be as independent contractors, and Anaconda and its employees or agents are not employees or agents of Lessor.

XVII. INSTRUMENT FOR RECORDING AND RELEASE

17.1 The parties shall execute for recording pur-

poses a Notice of Lease of the same date as this Mining Lease, in the form attached hereto as Exhibit "A", and shall cause such Notice to be recorded on the records of Salt Lake County, Utah.

XVIII. OCCUPATION OF LEASED PREMISES

18.1 Anaconda acknowledges that it has made a physical inspection of the Property, including underground workings and all other property, including equipment and machinery, and is familiar with the condition of same and accepts said Property and equipment in their present condition.

XIX. SURRENDER OF POSSESSION

19.1 Anaconda shall on or before the last day of he term hereby granted, or of any extended term, or upon the sooner termination of this Mining Lease due to default or other reason, subject to the provisions of Article IX and X hereof, peaceably and quietly leave, surrender all right, title and interest, and yield up unto Lessor all and singular the Property, together with all alterations, additions and replacements thereon, free of subtenancies, liens, encumbrances and in good order and condition, except for reasonable wear and tear thereof.

19.2 Within six (6) months after the expiration or termination of this Mining Lease, Anaconda shall deliver to Lessor all records of production, assays, maps and sections,

further acts and things as may be necessary to carry out the intent of this Mining Lease fully and effectually.

XXIII. GOVERNING LAW

23.1 This Mining Lease shall be construed according to the laws of the State of Utah.

XXIV. INTEGRATION AND STOCKHOLDER APPROVAL

24.1 This Mining Lease, together with exhibits identified herein and attached hereto, constitutes the whole agreement between the parties. There are no terms, obligations, covenants or conditions other than contained in this Mining Lease. No variation of this Mining Lease shall be valid unless executed in writing by the parties.

24.2 This Mining Lease and the lease granted hereby is subject to and conditional upon the authorization by a majority vote of the stockholders of Lessor at a stockholders' meeting called pursuant to and as required by Section 16-10-74, Utah Code Annotated.

IN WITNESS WHEREOF, the parties hereto have executed this Mining Lease as of the date first above written.

NEW BINGHAM-MARY MINING COMPANY

By _____

Its _____

LESSOR

THE ANACONDA COMPANY

By Luke J. McDonnell
Its VICE PRESIDENT

LESSEE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

On this 27th day of April, 1979, before me, a notary public, appeared J. J. O'Brien, known to me to be the President of NEW BINGHAM-MARY MINING COMPANY that executed the within instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Gloria F. Best
Notary Public
Residing at Denver

My Commission Expires:

My commission expires September 22, 1981

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

On this 30th day of April, 1979, before me, a notary public, appeared A. J. McDonnell, known to me to be the Vice President of The ANACONDA Company, that executed the within instrument and acknowledged to me that such corporation executed the same.

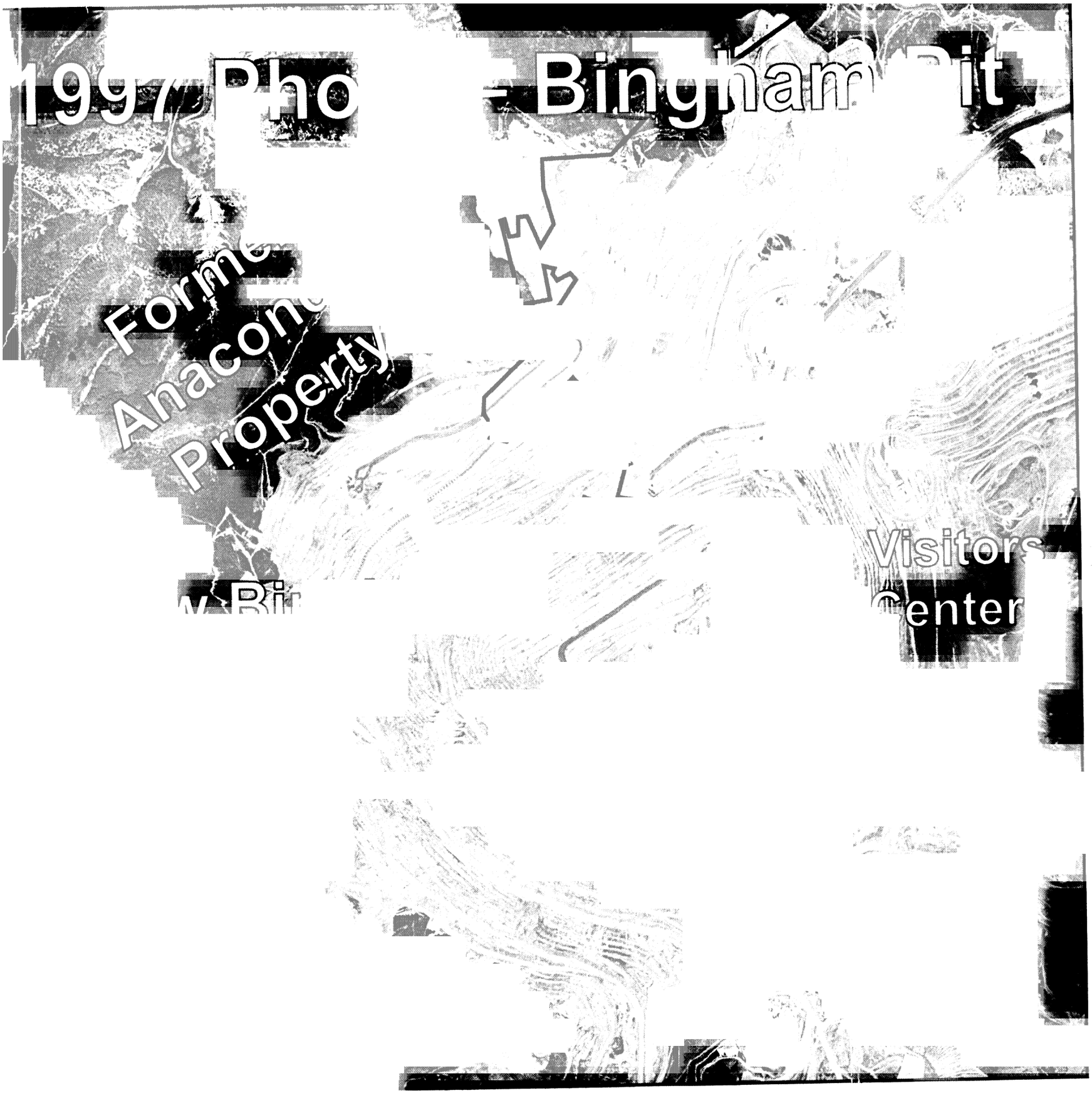
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public
Residing at 1429 Utah
Aurora Co 80010

My Commission Expires:

My Commission expires December 15, 1982

Tab 6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